Anas Construction Sdn Bhd v JKP Sdn Bhd and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-4–01 OF 2023(P) AND 02(f)-3–01 OF 2023(P)
ABDUL RAHMAN SEBLI CJ (SABAH AND SARAWAK), MARY LIM AND NORDIN HASSAN FCJJ
8 JANUARY 2024

Building and Construction Law — Adjudication — Construction Industry Payment and Adjudication Act 2012 ('CIPAA') — Adjudicator made decision based on clause of contract not relied upon in payment claim and adjudication claim to support cause of action — Whether strict rules of pleadings, as applicable in civil claims before Malaysian courts, applied in adjudicating proceedings under CIPAA — Whether dicta in View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22 prohibited adjudicator from referring to specific clause in construction contract when allowing claim when said clause was not specifically stated in payment claim and adjudicating claim by claiming party — Whether adjudicator's consideration of specific clause in construction contract, not specifically stated in payment claim or adjudication claim, without inviting parties to further submit on said clause, amounted to breach of natural justice or act in excess of its jurisdiction, such that said award ought to be set aside — Construction Industry Payment and Adjudication Act 2012 ss 5, 6 & 27

The respondent appointed the appellant as the main contractor for the construction and completion of a project ('the project') for a sum of RM67,994,500 under a construction contract ('the contract'). In carrying out the project, the appellant engaged independent professional consultants to provide a report in regard to cracked beams and a safety report. The consultants' fees incurred by the appellant were RM855,074.21. However, the respondent allegedly had failed, neglected or refused to pay the said amount resulting the matter being brought to the adjudicator for adjudication under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The payment claim was served on the respondent by the appellant under s 5 of the CIPAA for the sum of RM855,074.21, the amount claimed under the payment claim. In the payment claim, the appellant pleaded cll 28, 55 and 56 of the contract to establish its cause of action against the respondent. The respondent in its payment response which was made under s 6 of the CIPAA and served on the appellant, disputed the appellant's claim on the basis that the appellant's claim did not fall within the meaning of 'construction contract' under s 5(1) of the CIPAA. Further, in the adjudication claim served by the appellant on the respondent pursuant to s 9(1) of the CIPAA, the appellant again relied on cll 28, 55 and 56 of the contract to support its claim for the

professional consultants' fees. In the adjudication response served by the respondent on the appellant under s 10(1) of the CIPAA, the respondent contended that the relevant clause in relation to the appellant's claim would be cl 36.5 of the contract which was not relied upon by the appellant. Pursuant to s 12(2) of the CIPAA, the adjudicator handed down the adjudicator decision which allowed the appellant's claim. The adjudicator found that the appellant had proved its case on the balance of probabilities and ordered, inter alia, for the respondent to pay the appellant the outstanding amount of RM806,673.78 as sought in the payment claim. In coming to the adjudication decision, the adjudicator relied on cl 36.6 of the contract rather than cll 28, 55 and 56 of the contract as cl 36.6 of the contract was most applicable to the appellant's claim. At the High Court, the application by the appellant to enforce the adjudication decision was allowed and the respondent's application to set aside the adjudication decision was dismissed. However, on appeal to the Court of Appeal, the decision of the High Court was set aside on the ground that the adjudicator had acted in excess of his jurisdiction when deciding the adjudication on the clause of the contract that was not relied upon by the appellant in its payment claim and adjudication claim to support its cause of action. Further, the omission of the adjudicator to invite the parties to submit on cl 36.6 of the contract relied upon by the adjudicator to support his decision was a denial of natural justice. Aggrieved, the appellant appealed against the decisions. Leave to appeal was granted on the following questions of law, namely: (a) whether the strict rules of pleadings, as applicable in civil claims before the Malaysian courts, applied in adjudicating proceedings under the CIPAA ('question 1'); (b) whether the dicta in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 prohibited an adjudicator from referring to a specific clause in a construction contract when allowing the claim when the said clause was not specifically stated in the payment claim and adjudicating claim by the claiming party ('question 2'); and (c) in a CIPAA award, whether the adjudicator's consideration of a specific clause in the construction contract, not specifically stated in the payment claim or adjudication claim, without inviting parties to further submit on the said clause, amounted to a breach of natural justice or an act in excess of its jurisdiction, such that the said award ought to be set aside ('question 3').

Held, dismissing the appeals:

(1) **(per Mary Lim FCJ, dissenting)** It was the dispute that arose from the payment claim that the adjudicator was required to adjudicate upon, decide and deliver the adjudication decision within the time prescribed after conducting the adjudication in the manner as the adjudicator considered appropriate using the powers conferred under s 25 of the CIPAA. This was apparent from s 12(1) and (2) of the CIPAA. Since it was the dispute that arose from the payment claim and not the payment claim itself per se that was referred to adjudication, it would be erroneous

and misleading to describe or characterise the payment claim and the payment response as pleadings. Although s 5 of the CIPAA required the details such as the provision(s) in the construction contract to which the payment related to be set out, this lack of particularity or specificity (especially of cl 36.6 of the contract) was not at all fatal, contrary to the finding of the Court of Appeal. While s 5 of the CIPAA provided for certain requirements to be set out in the payment claim, it was silent as to how much detail should be provided. The inclusion of the words 'including the provision in the construction contract to which the payment relates' in s 5(2)(b) of the CIPAA was actually intended to be illustrative of what those details may be. The reason why the cause of action had to be identified was so that the non-paying party was able to respond to the claim for work done or services rendered. Non-citing or even the citing of a wrong clause or provision of a construction contract did not and could not render the adjudicator bereft of jurisdiction. In fact, cl 36.6 of the contract was already cited in the payment claim and adjudication claim. The letters exchanged between the parties which were necessarily part of the payment claim and adjudication claim showed that the appellant had actually invoked cl 36.6 of the contract amongst several other provisions. Thus, the Court of Appeal was clearly in error when it concluded that cl 36.6 of the contract was not raised or 'pleaded'; that the adjudicator had unilaterally relied on cl 36.6 of the contract and had gone on a frolic of his own thus acting without jurisdiction and committed a material breach of natural justice. The payment claim clearly complied with the statutory requirements and the respondent was not in any way impaired or unable to respond to the claim. Question 1 was answered in the negative (see paras 47–49, 65, 68–69, 80–81 & 89).

(2) **(per Mary Lim FCJ, dissenting)** The subject of the claim and the cause of action was always about the single dispute over the claim for professional fees. The jurisdiction of the adjudicator was to adjudicate on this subject claim. The appellant had set out the amount, due date for payment, details of the cause of action for this claim for the professional fees with certain clauses of the underlying contract identified, description of the work done, and a statement that the claim was made under the Act. All this information had to be compressed or summarised as 'the nature and description of the dispute and the remedy sought' when preparing the adjudication claim, as required under ss 8 and 9 of the CIPAA. The respondent, not in the least confused and being fully aware of the thrust of the appellant's claim, put up a meaningful response. Unfortunately, none of the responses as detailed by the respondent passed muster with the adjudicator, and the claim was allowed. This, did not render the payment claim and ultimately the adjudication decision reached liable to be set aside for the reasons complained of by the respondent and agreed

to by the Court of Appeal. Consequently, question 2 must also be answered in the negative (see paras 100–102). A

(3) **(per Mary Lim FCJ, dissenting)** The high threshold which the respondent necessarily had to meet in view of the intent of CIPAA, its operation and application, was never met at all by the respondent, be it on the facts or even on the assumption that the learned adjudicator had referred to cl 36.6 of the contract unilaterally. Clause 36.6 of the contract which was part of cl 36 of the contract was drawn to the adjudicator's attention by the respondent itself. It was artificial and totally impractical if not naive to claim that the adjudicator could not, with his inquisitorial powers under s 25 of the CIPAA, make his observations about some other subclauses of cl 36, including cl 36.6 of the contract. The adjudicator was entitled to look at the whole of cl 36 of the contract, and the rest of the contract. Adjudication proceedings involved inquisitorial inquiries and not adversarial process. The adjudicator was therefore not in breach of any rule of procedural fairness when he did not invite the parties, especially the respondent to comment on cl 36.6 of the contract. The way allegations and complaints of breach of natural justice were treated and addressed by the courts in public law should not have the same foothold here in statutory adjudication dealing specifically with payment disputes in construction contracts, an entirely commercial arrangement. So long as the adjudicator confined himself to the dispute that was referred to him under s 5 of the CIPAA, even if he decided it wrongly, he had not exceeded his jurisdiction and there was no breach of natural justice. The circumstances complained of by the respondent plainly did not warrant intervention by the court and the Court of Appeal was plainly in error for intervening. Question 3 was also answered in the negative. The appeals were thus allowed and the decisions of the Court of Appeal were set aside (see paras 136–139 & 146–148). B C D E F

(4) **(per Nordin Hassan FCJ, majority)** The plain meaning of s 27(1) of the CIPAA was that the jurisdiction of an adjudicator was limited to matters referred to by parties to the adjudicator pursuant to ss 5 and 6 of the same Act. Section 5(b) of the CIPAA required the claimant to include in the payment claim the cause of action and the provision under the contract to which the payment related. Thus, the claimant must identify the cause of action and the provision under the contract that supported the cause of action. As the adjudicator's jurisdiction was limited to matters referred to the adjudicator under ss 5 and 6 of the CIPAA, and the cause of action based on cl 36.6 of the contract was not relied upon in the payment claim, the adjudicator had exceeded his jurisdiction in deciding the dispute based on cl 36.6 of the contract. The cause of action under cl 36.6 of the contract was not the appellant's case in the payment claim or the respondent's rebuttal in the payment response. Moreover, both parties had not given written consent to extend the adjudicator's jurisdiction to G H I

adjudicate the matters relying on the cause of action established in cl 36.6 of the contract as required under s 27(2) of the CIPAA. If the adjudicator found that the cause of action was established under a different clause of the contract, the matter should be brought to the attention of the parties and if agreed, written consent be issued under s 27(2) of the CIPAA to clothe the adjudicator with the jurisdiction to adjudicate the matters based on the cause of action under cl 36.6 of the contract. On this ground of want of jurisdiction alone, the adjudication decision could not stand. The adjudicator had acted in excess of his jurisdiction (see paras 173–174, 186 & 189–190).

(5) **(per Nordin Hassan FCJ, majority)** The non-giving of the opportunity by the adjudicator for the parties to submit or canvass the issue of cause of action under cl 36.6 of the contract before making the decision, was a denial of natural justice. The main question was whether the applicant's cause of action established under any of the clauses in the contract and pleaded in the payment claim were matters adjudicated by the adjudicator as mandated under s 27(1) of the CIPAA. The issue of strict rules of pleading in civil claims to be complied with did not arise and was misplaced as s 27(1) of the CIPAA had underlined the limited jurisdiction of the adjudicator to adjudicate matters referred to the adjudicator under s 5 of the CIPAA, that was the payment claim, and s 6 of the CIPAA, which was the payment response. The answer to this main question was in the negative. It was therefore unnecessary to answer the questions posed by the appellant for the court to decide on the appeal (see paras 197–199).

[Bahasa Malaysia summary

Responden melantik perayu sebagai kontraktor utama bagi pembinaan dan penyiapan satu projek ('projek') dengan jumlah RM67,994,500 di bawah satu kontrak pembinaan ('kontrak'). Dalam melaksanakan projek itu, perayu telah menggunakan perunding profesional bebas untuk menyediakan laporan berkenaan dengan keretakan rasuk dan laporan keselamatan. Yuran perunding yang ditanggung oleh perayu ialah RM855,074.21. Walau bagaimanapun, responden didakwa telah gagal, mengabaikan atau enggan membayar jumlah tersebut menyebabkan perkara itu dibawa kepada adjudikator untuk adjudikasi di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP'). Tuntutan pembayaran telah disampaikan kepada responden oleh perayu di bawah s 5 APAIP untuk jumlah RM855,074.21, jumlah yang dituntut di bawah tuntutan pembayaran. Dalam tuntutan pembayaran, perayu pemplid klausa 28, 55 dan 56 kontrak untuk membuktikan kausa tindakannya terhadap responden. Responden dalam respons pembayarannya yang dibuat di bawah s 6 APAIP dan disampaikan kepada perayu, mempertikaikan tuntutan perayu atas dasar bahawa tuntutan perayu tidak termasuk dalam pengertian 'kontrak pembinaan' di bawah s 5(1) APAIP. Selanjutnya, dalam tuntutan

adjudikasi yang disampaikan oleh perayu ke atas responden menurut s 9(1) APAIP, perayu sekali lagi bergantung pada klausa 28, 55 dan 56 kontrak untuk menyokong tuntutannya bagi yuran perunding profesional. Dalam respons adjudikasi yang disampaikan oleh responden terhadap perayu di bawah s 10(1) APAIP, responden berhujah bahawa klausa yang berkaitan berhubung dengan tuntutan perayu ialah klausa 36.5 kontrak yang tidak disandarkan oleh perayu. Menurut s 12(2) APAIP, adjudikator memberikan keputusan adjudikator yang membenarkan tuntutan perayu. Adjudikator mendapati perayu telah membuktikan kesnya atas imbangan kebarangkalian dan memerintahkan, antara lain, agar responden membayar perayu jumlah tertunggak sebanyak RM806,673.78 seperti yang dipohon dalam tuntutan pembayaran. Dalam membuat keputusan adjudikasi, adjudikator bergantung pada klausa 36.6 kontrak dan bukannya klausa 28, 55 dan 56 kontrak kerana klausa 36.6 kontrak adalah paling sesuai untuk tuntutan perayu. Di Mahkamah Tinggi, permohonan perayu untuk menguatkuasakan keputusan adjudikasi dibenarkan dan permohonan responden untuk mengenepikan keputusan adjudikasi telah ditolak. Walau bagaimanapun, atas rayuan kepada Mahkamah Rayuan, keputusan Mahkamah Tinggi telah diketepikan atas alasan bahawa adjudikator telah bertindak melebihi bidang kuasanya apabila memutuskan adjudikasi terhadap klausa kontrak yang tidak disandarkan oleh perayu dalam tuntutan pembayaran dan tuntutan adjudikasi untuk menyokong kausa tindakannya. Selanjutnya, peninggalan adjudikator untuk menjemput pihak-pihak untuk berhujah klausa 36.6 kontrak yang disandarkan oleh adjudikator untuk menyokong keputusannya adalah penafian keadilan semula jadi. Terkilan, perayu merayu terhadap keputusan tersebut. Kebenaran untuk merayu telah diberikan atas persoalan undang-undang berikut, iaitu: (a) sama ada peraturan pliding yang ketat, sebagaimana terpakai dalam tuntutan sivil di hadapan mahkamah Malaysia, digunakan dalam menghakimi prosiding di bawah APAIP ('soalan 1'); (b) sama ada dicta dalam *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 melarang adjudikator daripada merujuk kepada klausa khusus dalam kontrak pembinaan apabila membenarkan tuntutan apabila klausa tersebut tidak dinyatakan secara khusus dalam tuntutan pembayaran dan tuntutan adjudikasi oleh pihak yang menuntut ('soalan 2'); dan (c) dalam award APAIP, sama ada pertimbangan adjudikator terhadap klausa khusus dalam kontrak pembinaan, tidak dinyatakan secara khusus dalam tuntutan pembayaran atau tuntutan adjudikasi, tanpa menjemput pihak untuk menghujah selanjutnya mengenai klausa tersebut, merupakan pelanggaran keadilan atau perbuatan yang melebihi bidang kuasanya, sehinggakan award tersebut harus diketepikan ('soalan 3').

Diputuskan, menolak rayuan-rayuan:

(1) **(oleh Mary Lim HMP, menentang)** Pertikaian yang timbul daripada tuntutan pembayaran adalah apa yang adjudikator dikehendaki

A mengadili, memutuskan dan menyampaikan keputusan adjudikasi dalam masa yang ditetapkan selepas menjalankan adjudikasi mengikut cara seperti adjudikator yang dianggap sesuai menggunakan kuasa yang diberikan di bawah s 25 APAIP. Ini jelas daripada s 12(1) dan (2) APAIP. Oleh kerana pertikaian timbul daripada tuntutan pembayaran dan bukan tuntutan pembayaran itu sendiri yang dirujuk kepada adjudikasi, adalah salah dan mengelirukan untuk menggambarkan atau mencirikan tuntutan pembayaran dan respons pembayaran sebagai pliding. Walaupun s 5 APAIP memerlukan butiran seperti peruntukan dalam kontrak pembinaan yang mana pembayaran berkaitan dinyatakan, kekurangan ketelitian atau kekhususan ini (terutama klausa 36.6 kontrak) tidak sama sekali fatal, bertentangan dengan dapatan Mahkamah Rayuan. Walaupun s 5 APAIP memperuntukkan keperluan tertentu untuk dinyatakan dalam tuntutan pembayaran, ia tidak dinyatakan berapa banyak butiran yang perlu diberikan. Kemasukan perkataan 'termasuk peruntukan kontrak pembinaan yang berkaitan dengan pembayaran' dalam s 5(2)(b) APAIP sebenarnya bertujuan untuk menggambarkan butiran tersebut. Sebab mengapa kausa tindakan perlu dikenal pasti adalah supaya pihak yang tidak membayar dapat menjawab terhadap tuntutan kerja yang dilakukan atau perkhidmatan yang diberikan. Tidak memetik atau malah memetik klausa atau peruntukan kontrak pembinaan yang salah tidak dan tidak boleh menyebabkan adjudikator kehilangan bidang kuasa. Malah, klausa 36.6 kontrak telah pun disebut dalam tuntutan pembayaran dan tuntutan adjudikasi. Pertukaran surat antara pihak-pihak yang semestinya merupakan sebahagian daripada tuntutan pembayaran dan tuntutan adjudikasi menunjukkan bahawa perayu sebenarnya telah menggunakan klausa 36.6 kontrak di antara beberapa peruntukan lain. Oleh itu, Mahkamah Rayuan jelas terkhilaf apabila ia membuat kesimpulan bahawa klausa 36.6 kontrak tidak dibangkitkan atau 'diplid'; bahawa adjudikator telah secara unilateral bergantung pada klausa 36.6 kontrak dan telah melakukan dapatan sendiri sehingga bertindak tanpa bidang kuasa dan melakukan pelanggaran berat terhadap keadilan semula jadi. Tuntutan pembayaran jelas mematuhi keperluan berkanun dan responden tidak dalam apa-apa cara terjejas atau tidak dapat menjawab tuntutan tersebut. Soalan 1 dijawab secara negatif (lihat perenggan 47–49, 65, 68–69, 80–81 & 89).

(2) **(oleh Mary Lim HMP, menentang)** Subjek tuntutan dan kausa tindakan adalah sentiasa mengenai pertikaian tunggal ke atas tuntutan yuran profesional. Bidang kuasa adjudikator adalah untuk mengadili ke atas tuntutan subjek ini. Perayu telah menetapkan amaun, tarikh akhir pembayaran, butiran kausa tindakan bagi tuntutan ini untuk yuran profesional dengan klausa tertentu kontrak yang dikenal pasti, perihalan kerja yang dilakukan, dan pernyataan bahawa tuntutan dibuat di bawah

Akta tersebut. Semua maklumat ini perlu dimampatkan atau diringkaskan sebagai 'sifat dan perihalan pertikaian dan remedi yang diminta' semasa menyediakan tuntutan adjudikasi, seperti yang dikehendaki di bawah ss 8 dan 9 APAIP. Responden, tidak sedikit pun keliru dan menyedari sepenuhnya teras tuntutan perayu, memberikan jawapan yang bermakna. Malangnya, tiada satu pun jawapan seperti yang diperincikan oleh responden diluluskan oleh adjudikator, dan tuntutan itu dibenarkan. Ini, tidak menyebabkan tuntutan pembayaran dan akhirnya keputusan adjudikasi yang dicapai bertanggungjawab untuk diketepikan atas alasan yang diadukan oleh responden dan dipersetujui oleh Mahkamah Rayuan. Oleh itu, soalan 2 juga harus dijawab secara negatif (lihat perenggan 100–102).

(3) **(oleh Mary Lim HMP, menentang)** Ambang tinggi yang perlu dipenuhi oleh responden berdasarkan niat APAIP, operasi dan penggunaannya, tidak pernah dicapai sama sekali oleh responden, sama ada berdasarkan fakta atau pun atas anggapan bahawa adjudikator yang bijaksana telah merujuk kepada klausa 36.6 kontrak secara unilateral. Klausa 36.6 kontrak yang merupakan sebahagian daripada klausa 36 kontrak telah ditarik ke perhatian adjudikator oleh responden sendiri. Adalah tidak wajar dan sama sekali tidak praktikal jika tidak naif untuk mendakwa bahawa adjudikator tidak boleh, dengan kuasa penyiasatannya di bawah s 25 APAIP, membuat pemerhatiannya tentang beberapa subklausa lain klausa 36, termasuk klausa 36.6 kontrak. Adjudikator berhak untuk melihat keseluruhan klausa 36 kontrak, dan selebihnya dalam kontrak pembinaan. Prosiding adjudikasi melibatkan pertanyaan penyiasatan dan bukan proses adversarial. Oleh itu, adjudikator tidak melanggar mana-mana peraturan keadilan prosedur apabila beliau tidak menjemput pihak-pihak, terutamanya responden untuk mengulas klausa 36.6 kontrak. Cara dakwaan dan aduan pelanggaran keadilan semula jadi dilayan dan ditangani oleh mahkamah dalam undang-undang awam tidak seharusnya mempunyai kedudukan yang sama di sini dalam adjudikasi berkanun yang menangani secara khusus pertikaian pembayaran dalam kontrak pembinaan, satu pengaturan komersial sepenuhnya. Selagi adjudikator menghadkan dirinya kepada pertikaian yang dirujuk kepadanya di bawah s 5 APAIP, walaupun beliau memutuskannya secara salah, beliau tidak melebihi bidang kuasanya dan tidak ada pelanggaran keadilan semula jadi. Keadaan yang diadukan oleh responden secara jelas tidak mewajarkan campur tangan oleh mahkamah dan Mahkamah Rayuan jelas terkhilaf kerana campur tangan. Soalan 3 juga dijawab secara negatif. Rayuan-rayuan oleh itu dibenarkan dan keputusan Mahkamah Rayuan telah diketepikan (lihat perenggan 136–139 & 146–148)

(4) **(oleh Nordin Hassan HMP, majoriti)** Maksud jelas s 27(1) APAIP adalah bidang kuasa adjudikator adalah terhad kepada perkara yang

dirujuk oleh pihak-pihak kepada adjudikator menurut ss 5 dan 6 Akta yang sama. Seksyen 5(b) APAIP menghendaki pihak yang menuntut untuk memasukkan dalam tuntutan pembayaran kausa tindakan dan peruntukan di bawah kontrak yang berkaitan dengan pembayaran itu. Oleh itu, pihak yang menuntut harus mengenal pasti kausa tindakan dan peruntukan di bawah kontrak yang menyokong kausa tindakan. Memandangkan bidang kuasa adjudikator terhad kepada perkara yang dirujuk kepada adjudikator di bawah ss 5 dan 6 APAIP, dan kausa tindakan berdasarkan klausa 36.6 kontrak tidak disandarkan pada tuntutan pembayaran, adjudikator telah melebihi bidang kuasanya dalam membuat keputusan pertikaian berdasarkan klausa 36.6 kontrak. Kausa tindakan di bawah klausa 36.6 kontrak bukanlah kes perayu dalam tuntutan pembayaran atau penyangkalan responden dalam respons pembayaran. Selain itu, kedua-dua pihak tidak memberikan kebenaran bertulis untuk melanjutkan bidang kuasa adjudikator untuk mengadili perkara-perkara yang bergantung kepada kausa tindakan yang ditetapkan dalam klausa 36.6 kontrak seperti yang dikehendaki di bawah s 27(2) APAIP. Jika adjudikator mendapati bahawa kausa tindakan telah diwujudkan di bawah klausa kontrak yang berbeza, perkara itu hendaklah dibawa kepada perhatian pihak-pihak dan jika dipersetujui, kebenaran bertulis dikeluarkan di bawah s 27(2) APAIP untuk memberikan adjudikator bidang kuasa untuk mengadili perkara berdasarkan kausa tindakan di bawah klausa 36.6 kontrak. Atas alasan kekurangan bidang kuasa ini sahaja, keputusan adjudikasi tidak dapat bertahan. Adjudikator telah bertindak melebihi bidang kuasanya (lihat perenggan 173–174, 186 & 189–190).

(5) **(oleh Nordin Hassan HMP, majoriti)** Ketiadaan peluang oleh adjudikator kepada pihak-pihak untuk menghujahkan atau mengemukakan isu kausa tindakan di bawah klausa 36.6 kontrak sebelum membuat keputusan, adalah penafian keadilan semula jadi. Persoalan utama ialah sama ada kausa tindakan pemohon yang ditetapkan di bawah mana-mana klausa dalam kontrak dan diplid dalam tuntutan pembayaran adalah perkara yang diadili oleh adjudikator seperti yang dimandatkan di bawah s 27(1) APAIP. Isu peraturan ketat pliding dalam tuntutan sivil untuk dipatuhi tidak timbul dan salah letak kerana s 27(1) APAIP telah menggariskan bidang kuasa terhad adjudikator untuk mengadili perkara yang dirujuk kepada adjudikator di bawah s 5 APAIP, iaitu tuntutan pembayaran, dan s 6 APAIP, yang merupakan respons pembayaran. Jawapan kepada soalan utama ini adalah negatif. Oleh itu, adalah tidak perlu untuk menjawab soalan yang dikemukakan oleh perayu untuk mahkamah memutuskan rayuan (lihat perenggan 197–199).]

Cases referred to

ABB Ltd v Bam Nuttall Ltd [2013] EWHC 1983 (TCC), QBD (refd)
ABC Glass & Aluminium Pty Ltd v Nik Nominees Pty Ltd [2019] QSC 171, SC (refd)
ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another case [2015] MLJU 1951, HC (refd)
AECOM Design Build Ltd v Staptina Engineering Services Ltd [2017] EWHC 723 (TCC), QBD (refd)
AJS v JMH and another appeal [2022] 1 MLJ 778; [2022] 1 CLJ 331, FC (refd)
Abdul Hakim bin Abdul Wahid v Mas Ermieyati bt Samsudin and another appeal [2023] 4 MLJ 232; [2023] 6 CLJ 667, FC (refd)
Balfour Beatty Construction Ltd v Lambeth London Borough Council [2002] EWHC 597 (TCC), QBD (refd)
Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] BLR 522, CA (refd)
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport [2004] NSWCA 394, SC (refd)
Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain [2022] 3 MLJ 450; [2022] 4 CLJ 657, FC (refd)
Ceylon Builders Sdn Bhd v Ultimate Pursuit Sdn Bhd and another appeal [2018] MLJU 1918, HC (refd)
Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC), QBD (refd)
Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358; [2006] BLR 15, CA (refd)
Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd [2008] SGHC 159, HC (refd)
Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590; [2016] 8 CLJ 293, FC (refd)
Discain Project Services Ltd v Opecprime Development Ltd [2000] BLR 402 (refd)
Dr Koay Cheng Boon v Majlis Perubatan Malaysia [2012] 3 MLJ 173; [2012] 4 CLJ 445, FC (refd)
Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case [2017] 7 MLJ 732; [2016] 5 CLJ 882, HC (refd)
Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd [2012] NSWCA 31, SC (refd)
Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania [2017] 3 SLR 103; [2016] SGHC 222, HC (refd)
Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd [2002] NSWCA 136, SC (refd)
Herbosh-Kiere Marine Contractors Ltd v Dover Harbour Board [2012] EWHC 84 (TCC), QBD (refd)
Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal [2020] 1 MLJ 174; [2020] 1 CLJ 299, FC (refd)

A *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258, SC (refd)
Leighton v Arogen [2012] NSWSC 1323, SC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)
B *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224; [2019] 8 CLJ 433, FC (refd)
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198, FC (refd)
Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd & Ors and another suit [2018] MLJU 1912; [2018] 1 LNS 2078, CA (refd)
C *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, SC (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273; [1981] CLJ 39, FC (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ
D 293; [2009] 6 CLJ 430, FC (refd)
Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal [2021] 1 MLJ 1, FC (refd)
Primus Build Ltd v Pompey Centre Ltd and another [2009] EWHC 1487 (TCC), QBD (refd)
E *Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals* [2017] 2 MLJ 421; [2017] 9 CLJ 595, FC (refd)
Protectavale Pty Ltd v K2K Pty Ltd [2008] FCA 1248, FC (refd)
Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873; [2015] 1 LNS 1435, HC (refd)
F *Roe Brickwork Ltd v Wates Construction Ltd* [2013] All ER (D) 105, QBD (refd)
SEF Construction Pte Ltd v Skoy Connected Pte Ltd [2010] 1 SLR 733; [2009] SGHC 257, HC (refd)
Semtex Ltd v Gladstone [1954] 2 All ER 206 (refd)
Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd [2005] NSWSC 1152, SC
G (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
Tan Kah Fatt & Anor v Tan Ying [2023] 2 MLJ 583, FC (refd)
Tan Sri Dato' Yap Suan Chee v CLT Contract Sdn Bhd [2021] MLJU 1964, HC
H (refd)
Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case [2017] MLJU 242; [2017] 1 LNS 177, HC (refd)
Tony Pua Kiam Wee v Government of Malaysia and another appeal [2019] 12 MLJ 1; [2020] 1 CLJ 337, FC (refd)
I *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499; [2015] AMEJ 27; [2015] 5 CLJ 527, HC (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2017] 8 AMR 167, FC (refd)
WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd [2015]

MLJU 1125; [2015] 1 LNS 1236, HC (refd)
WY Steel Construction Pte Ltd v Osko Pte Ltd [2013] SGCA 32, CA (refd)
Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266, SC (refd)
Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd [2010] NSWSC 168, SC (refd)

Legislation referred to

Arbitration Act 2005
Building and Construction Industry Security of Payments Act 2004 [SG] s 17(3)
Construction Industry Payment and Adjudication Act 2012 ss 4, 5, 5(1), (2), (2)(a), (2)(b), (2)(c), (2)(d), 6, 6(1), (4), 7(1), 8, 8(2), (3), 9, 9(1), 10, 10(1), 11, 12(1) (2), (5), 13, 15, 15(b), (d), 21, 25, 26, 27, 27(1), (2), 28, 32(a), Part II
Construction Industry Payment and Adjudication Regulations 2014 reg 4(a)
Courts of Judicature Act 1964
Housing Grants, Construction and Regeneration Act 1996 [UK]
Interpretation Acts 1948 and 1967 s 17A
Rules of Court 2012 O 14, O 18 r 19

Appeal from: *JKP Sdn Bhd v Anas Construction Sdn Bhd and another appeal* [2022] 6 MLJ 503 (Court of Appeal, Putrajaya)

Ong Yu Shin (with Lim Wooi Ying and Lee Hooi Ying) (The Chambers of Yu Shing Ong) for the appellant.
Mahinder Singh Dulku (with Abdul Fareed bin Abdul Gafoor and Farah Nabilah bt Shaharuddin) (Ezrilaw Firm) for the respondent.

Mary Lim JCA (delivering dissenting judgment of the court):

[1] These two appeals concern three questions of law that arose under our statutory adjudication regime established under the Construction Industry Payment and Adjudication Act 2012 (Act 123) ('the CIPAA'):

(a) do the strict rules of pleadings, as applicable in civil claims before the Malaysian Courts, apply in adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012?

(b) whether the dicta in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2017] 8 AMR 167 prohibits an adjudicator from referring to a specific clause in a construction contract when allowing a claim, when the said clause was not specifically stated in the payment claim and adjudication claim by the claiming party? and

(c) in a CIPAA award, does the adjudicator's consideration of a specific clause in the construction contract, not specifically stated in the payment

A claim or adjudication claim, without inviting parties to further submit on the said clause, amount to a breach of natural justice or an act excess in jurisdiction, such that the said award ought to be set aside?

B **[2]** The appellant submits the answer to all three questions should be in the negative. I agree for the reasons that follow.

MATERIAL FACTS

C **[3]** The appellant was the main contractor appointed by the respondent pursuant to a written construction contract dated 9 April 2015 ('construction contract') using the PWD standard form of contract PWD Form 203A (Rev 1/2010) for the project known as 'Cadangan Membina dan Menyiapkan Satu (1) Blok Pangsapuri 24 Tingkat Rumah Pangsa Kos Sederhana (382 units) di atas Tanah Tebusguna Kerajaan, Kampung Pisang Awak, Seksyen 4, Bandar
D Jelutong, Daerah Timur Laut, Pulau Pinang' with a completion date of 8 April 2017 but which was extended to 23 August 2019.

E **[4]** Disputes unfortunately arose between the parties leading the appellant to terminate the construction contract on 15 May 2017. The appellant submitted a total of 19 interim progress claims, some of which formed the subject of four other adjudication claims which are not in issue in these appeals.

F **[5]** On 9 June 2017, the appellant submitted its revised final claim together with supporting documents. The claim this time was for professional fees and charges amounting to RM855,074.21 incurred in relation to the preparation of a safety report, required following Architect's Instruction No 18. The Project Quantity Surveyor recommended a sum of RM795,013.78 to be paid to the appellant for such professional fees. The respondent did not pay.

G **[6]** And, so the appellant initiated statutory adjudication proceedings by first issuing the respondent with a payment claim dated 6 March 2019. The respondent served its payment response dated 22 March 2019 disputing the claim.

H **[7]** On 7 May 2019, the appellant issued a notice of adjudication. An adjudicator was appointed on 29 May 2019.

[8] Following the appointment, the appellant issued an adjudication claim
I on 26 June 2019 and the respondent responded with an adjudication response on 10 July 2019. The appellant served its adjudication reply on 16 July 2019.

[9] In its adjudication response, the respondent explained its reasons for disputing the appellant's claim, be it the sum as claimed or the amount

recommended by the Project Quantity Surveyor. Aside from asserting that there was no sum due and payable to the appellant, the respondent cited cl 36.5 of the construction contract as the 'crucial provision' as well as several other clauses that it considered relevant, namely cll 1.2(a), 3.3, 5.1(b), 5.2, 6.1, 10.0(a), 31.0 and 33.0. The respondent added that 'it is significant to note that the claimant is not invoking the above provisions in support of its claim'.

[10] The respondent further cited a lack of proof of AI, EI or relevant direction (para F); that there was abuse of process as the claim ought to have been brought via an earlier adjudication claim; and because the clauses relied on either 'has no bearing' or are in dispute (para G). It was the respondent's case that the appellant was not entitled to be paid because it was the appellant who was in breach of contract. The concrete utilised by the appellant was alleged to be not in compliance with the contract specifications and requirements and since the report was in relation to the supplied concrete specifications in question, the respondent was not obliged to pay. Further, the claim was without merit as the latest 'Revised Final Draft Claim' issued by the Project Quantity Surveyor had totally deleted the sum claimed.

[11] The adjudicator held it was 'better to understand, examine and peruse' the respondent's reasons or defences for failing, neglecting and/or refusing to pay for the cost of the independent consultants as claimed by the appellant. Those reasons or defences were categorised as follows:

(a) whether the appellant's claim falls within the ambit of CIPAA (para A);

(b) whether the appellant's claim initiated in the present adjudication proceedings is considered an abuse of process and is res judicata (para B);

(c) whether the doctrine of res judicata and issue of estoppel has an effect and applied on the respondent's defence on the issue of under grade concrete (para C); and

(d) whether the appellant is entitled to its claim for the cost of independent consultants (para D).

[12] After examining the legislation and relevant case law, the first issue was answered as follows:

> 79. There is no further elaborate and substantiate to this point of defence in its AR. It is remained baseless contentious issue raised by the respondent.
>
> 80. Premise on the above, I am of the considered view that the respondent raised this point of defence in its Payment Response without further substantiated, is unmeritorious and untenable. By foregoing reason, I am hold to dismiss this point of defence raised by the respondent in its Payment Response.

[13] The second and third defences were similarly dismissed as 'unmeritorious' (see para 85) and 'untenable' (para 97). As for the last issue of whether the appellant was entitled to payment, this is what the adjudicator said:

> 99. There are three essential ground raised by the Respondent which is the most relevant and in connection to the Claimant's claim for the cost of Independent Consultant as following:
>
> – The provision of the Contract is Clause 36.5 of COC,
>
> – The Claimant has not produced any AI or EI or relevant direction by the Respondent's consultants, and
>
> – There is no certificate issued by the Respondent and/or Respondent's consultants and in the absence of any certificate payable to the Claimant regards to the Independent Consultants fees, in result there is no debt owing to the Claimant.

[14] In relation to the first of these three defences, the adjudicator said:

> 100. The Respondent argued that the correct and crucial provision of the Contract is Clause 36.5 of COC and that the Claimant has not invoking this provision in support of its claim. However, in my considered opinion, the Clause 36.6 of COC are the one most applicable to the Claimant's claim. Clause 36.6 of COC which provides as below:
>
> > 36.6 Notwithstanding anything in clause 36.5, if the *Contractor carries out any further test as required by the S.O.* pursuant to clause 36.2 and the result of such test shows the workmanship or materials is not in accordance with the provisions of the Contract, then the cost of such test shall be borne by the Contractor. *But if the result of such test shows the workmanship or materials comply with the provisions of the Contract, then the cost of such test shall be borne by the JKP Sdn Bhd.* (Emphasis added.)

[15] On the remaining two defences, the adjudicator found that documentary evidence of instruction to the appellant to prepare and conduct the relevant report vide the Architect and C&S consultant's letters dated 26 August 2016 and 9 December 2016, the contents of which were set out at para 102 of the decision. At para 105, the adjudicator concluded that the appellant had proved on balance of probabilities that it had produced the report the cost of which was the subject of the claim, was 'as instructed by the Respondent's consultants'.

[16] The appellant applied to have the decision enforced under s 28 of the CIPAA while the respondent applied to have it set aside under 15 of the same. The respondent cited the following grounds:

(a) there has been a denial of natural justice;

(b) the adjudicator had acted in excess of jurisdiction; and

(c) the adjudicator had not acted independently or impartially.

DECISION OF THE HIGH COURT

[17] The learned judge dismissed the respondent's application finding that the failure to specifically plead cl 36.6 of the construction contract was not fatal to the appellant's case. It was sufficient that the whole construction contract had been pleaded. The learned judge also found that there was no breach of natural justice; that in any case, the respondent had failed to show how the adjudicator had acted unfairly and how there was any substantial prejudice to the respondent. The High Court then proceeded to grant the enforcement order.

DECISION OF THE COURT OF APPEAL

[18] The Court of Appeal reversed the decisions of the High Court. It found that the adjudicator had acted in excess of his jurisdiction when he decided on a matter that was not raised or pleaded in the payment claim, in particular cl 36.6. The non-plea was a statutory non-compliance of s 5(2)(b) was 'fatal' according to the Court of Appeal. It found that 'it is clear from the decision of the Federal Court in *View Esteem* that the adjudication pleadings in ss 9 to 11 of the CIPAA are pivotal and not mere formal manifestations of the dispute'. With this non-compliance, the Court of Appeal held that the adjudicator thus had no jurisdiction to adjudicate on cl 36.6.

[19] The adjudicator was also found to be in breach of natural justice by that unilateral reliance on cl 36.6. According to the Court of Appeal, the adjudicator had gone 'on a frolic of his own and failed to apply the rules of natural justice ... that he had committed a material breach of the rules of natural justice by failing to notify or bring to the attention of the parties that he was relying on the un-pleaded cl 36.6 of the Contract, which was the basis of his decision to allow the respondent's claim, without allowing the parties the opportunity to comment or to take their respective stands'. Although the adjudicator had powers under s 25 to take the initiative to ascertain the facts and the law required for his decision, the Court of Appeal disagreed with the submissions of the appellant that 'such power extends to enable the adjudicator to unilaterally cherry-pick a specific clause of the underlying contract to make out a cause of action for a claimant where the claimant has been put on notice that the clauses relied upon are not applicable'.

A ANALYSIS AND DETERMINATION

[20] The analysis and resolution of the three questions of law requires a return to the fundamental principles of statutory adjudication introduced in Malaysia, solely and exclusively for and in the realm and practice of B construction contracts as defined in s 4 of the CIPAA. This mechanism is not available elsewhere unless of course parties choose collaborative contract resolutions or any other specialised regime in their bespoke contracts.

C **[21]** CIPAA, though it had received Royal Assent on 18 June 2012 did not come into force until 15 April 2014. Its long title explained that it is an 'Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication to provide remedies for the recovery of payment in the construction industry and to provide for connected and D incidental matters. The construction industry enjoys the availability of this 'extra' dispute resolution mechanism or forum because of the role it plays in the economy, as explained in Parliament at the time the legislation was first introduced for consideration. Excerpts of the debate in Parliament may be found in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and* E *another case* [2015] 11 MLJ 499; [2015] AMEJ 27; [2015] 5 CLJ 527; and in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224; [2019] 8 CLJ 433.

[22] Those principles have been carefully explained in the decisions of this F court, endorsing the views first expressed in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case*:

> CIPAA is intended to provide an intervening provisional decision or 'a temporary balance ... in appropriate circumstances ... in favour of those who claim payment, at the temporary expense if necessary of those who pay'. These adjudication G decisions, 'being quick and dirty', also provide a quick enforceable interim decision under the rubric of 'pay now, argue later', are necessary so as to give 'life' back to the enterprise or underlying contract which has reached an impasse or stalemate. It is in the very nature of the scheme or mechanism that the substantive issues relating to the payment can still be argued at a later point; or taken concurrently at separate H proceedings initiated in court or at arbitration.

[23] Amongst the decisions of the apex court are *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2017] 8 AMR 167; *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal*; and *Jack-In Pile (M) Sdn Bhd* I *v Bauer (M) Sdn Bhd and another appeal* [2020] 1 MLJ 174; [2020] 1 CLJ 299, just to name a few.

[24] In *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal*, this court said that the 'raison d'etre of the CIPAA 2012 regime lie in

facilitating and providing remedies for the recovery of payment in the construction industry'; that CIPAA brought three major changes to the construction industry in Malaysia, amongst which was 'a speedy resolution through adjudication for construction disputes relating to payment for works carried out under the construction contract'. Further, this court opined that CIPAA was:

> ... enacted by the Parliament to provide an easily accessible, faster and cheaper resolution forum, ie the adjudication. The following characteristics of the CIPAA 2012 is in tandem with the said intent:
>
> (a) it involves tight time constraints. The deadline for each step is fixed and the timeline for each stage is relatively short to ensure that the disputes are resolved rapidly and quickly;
>
> (b) it involves a significant degree of informality;
>
> (c) it gives adjudicator's determination a degree of conclusiveness;
>
> (d) it involves rights which are interim only. The rights and liabilities under the Act do not affect other entitlement a person may have under a construction contract or any other remedy a person may have for recovering such entitlement;
>
> (e) the standard adjudicator's fee is introduced and the charges are cheaper than arbitration. Low cost decision making is a core object of the scheme in the Act; and
>
> (f) the grounds on which the Court can rely upon to set aside the adjudicator's determination are limited. The Court's primary duty must be to uphold the adjudicator's determination and not to revisit the factual or legal matters canvassed before the adjudicator.
>
> [51] It is clear, therefore, that the issue of cash flow is the primary objective of the CIPAA 2012 as it is deemed to be the life-blood of the construction industry. This position has been recognised by our courts.

[25] In *Martego Sdn Bhd*, this court also reminded that when interpreting any legislation, there must be regard to the purpose of an Act; that such approach is in fact already statutorily enacted in the terms of s 17A of the Interpretation Acts of 1948 and 1967 (Act 388). This is an approach long since adopted by this court and the good and proper administration of justice requires if not demands that there is consistent understanding and application of its own principles. See for instance *Tan Kah Fatt & Anor v Tan Ying* [2023] 2 MLJ 583; *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450; [2022] 4 CLJ 657; *AJS v JMH and another appeal* [2022] 1 MLJ 778; [2022] 1 CLJ 331.

[26] In Bursa Malaysia Securities, this court held that the purposive rule of construction prevails over the literal rule of construction in the interpretation

of a statute since there is now s 17A of Act 388. In *Tan Kah Fatt*, this court concluded that in interpreting a statute, 'the courts must favour a construction which promotes the purpose, object or intent of the legislation over a construction which does not'; adding that this approach does not wait for the state of ambiguity to present before the purposive approach is adopted and applied. The purposive rule of interpretation applies with equal force in the field of statutory adjudication.

[27] The interpretation and application of CIPAA to any fact pattern must thus always have that ethos and intent in mind, that the decision under scrutiny of the court bears the unusual hallmark of temporary or interim finality; and the courts should strive to give a reading of the provisions in CIPAA that is consistent with and implements that purpose and intent. The final determination of the payment dispute lies elsewhere, be it in arbitration or in litigation and that the primary function of the court is to decide, for the purpose of these appeals, whether any of the grounds in s 15 to set aside an adjudication decision has been established.

[28] CIPAA is replete with provisions which facilitates this approach. To start with is the adjudication regime itself. It is only available for and to construction contracts as defined in s 4. That definition does not lend itself to an extensive group of contracts; for instance, CIPAA does not apply to a construction contract entered into by a natural person for any construction work in respect of a building which is less than four storeys high and which is wholly intended for personal occupation — see *Tan Sri Dato' Yap Suan Chee v CLT Contract Sdn Bhd* [2021] MLJU 1964.

[29] Next, the adjudication regime is only available to payment disputes as delineated in Part II of the Act, that it is meant to resolve disputes relating to claims of non-payment for work done or services rendered under the express terms of a construction contract; and nothing more. Because the mechanism is intended to unravel or uncork the cashflow problems that frequently plague the construction industry, and this industry is known to face dispute over payments as a norm; it was initially thought that the statutory regime was only available for resolution of progress claims and not final claims.

[30] This has since been settled by this court in *Martego Sdn Bhd*, that there is 'nothing to stop the CIPAA 2012 from applying to the case at hand'; the case being one relating to claims for professional fees upon termination of the construction contract. The subject matter in the present appeals similarly concerns claims for professional fees arising from a terminated contract.

[31] The time frame under which the dispute is expected to be resolved is relatively short compared to litigation or arbitration, some 109 days. Further,

s 8(3) allows the warring parties to represent themselves or be represented by any representative appointed by the party. Legal representation is not a prerequisite even when dealing with corporations unlike litigation in court.

[32] Where a decision is delivered by the adjudicator favouring the claimant, that decision is necessarily about the amount to be paid, time and manner of payment. This is obvious from the terms of s 12(5) and because the dispute is solely about payment for work done or services rendered.

[33] The decision of the adjudicator is binding unless any of three circumstances presents. First, where the decision is set aside under s 15; second, where the subject matter is settled by written agreement between the parties; or third, where the dispute is finally decided by arbitration or the court — see s 13. It is the effect of this section that has led to the statutory adjudication regime being understood as 'rough justice'; 'pay now, dispute or argue later'; and the concept of interim finality, in almost all jurisdictions that practised it.

[34] Another facet of this unique feature of interim finality in statutory adjudication is the fact that persons who are qualified to sit or be appointed as adjudicators are not necessarily legally qualified — see ss 21 and 32(a) of the CIPAA and reg 4(a) of the CIPAA Regulations 2014 and discussions on this aspect in *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd* [2015] MLJU 1125; [2015] 1 LNS 1236. This aspect has, in my view, a substantial bearing against any argument or insistence of likening adjudication proceedings to proceedings in a court of law. Far from it, that it is precisely that it is not proceedings in court or even in arbitration that statutory adjudication enjoys these especial features that are resoundingly acknowledged by the courts from the numerous judgments, both reported and unreported.

[35] To complement this philosophy, ss 12(1) and 25 of the CIPAA contain extensive prescription on the adjudicator's powers and jurisdiction on how the adjudication is to proceed:

> 12(1) The adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under section 25.
>
> 25 The adjudicator shall have the powers to —
>
> (a) establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;
>
> (b) order the discovery and production of documents;
>
> (c) set deadlines for the production of documents;
>
> (d) draw on his own knowledge and expertise;
>
> (e) appoint independent experts to inquire and report on specific matters with the consent of the parties;

(f) call for meetings with the parties;

(g) conduct any hearing and limiting the hearing time;

(h) carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;

(i) inquisitorially take the initiative to ascertain the facts and the law required for the decision;

(j) issue any direction as may be necessary or expedient;

(k) order interrogatories to be answered;

(l) order that any evidence be given on oath;

(m) review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;

(n) decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter;

(o) award financing costs and interests; and

(p) extend any time limit imposed on the parties under this Act as reasonably required.

[36] The adjudicator's duty is really, first and last, to decide the dispute that is referred in the notice of adjudication issued under s 8. This is clear from the terms of s 12(2).

[37] With these basic principles settled, I turn now to the questions of law.

[38] First, the matter of pleadings. Do the strict rules of pleadings, as applicable in civil claims before the Malaysian Courts, apply in adjudication proceedings under CIPAA? The answer is clearly in the negative.

[39] There are no pleadings in statutory adjudication as generally understood and practised in court proceedings; and it will be wrong to equate adjudication proceedings to proceedings in court with its attendant principles and ramifications as provided under the Rules of Court 2012, enacted under the Courts of Judicature Act 1964 (Act 91); and developed through case law. One of those principles is the rule of binding pleadings, that the parties are not allowed to go outside the ambit of their pleaded case. But, even then, that rule has to be properly understood as seen in the case of *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185, that if the other party has had reasonable notice of the un-pleaded issue to which evidence has been led, a fresh point may be allowed by the court. That, however, does not arise in these appeals nor in statutory adjudication.

[40] The terms 'pleadings', 'plea' or 'plead' also do not appear in any of the provisions of CIPAA. Contrast this with the Rules of Court 2012 where the term 'pleadings' may be found throughout the Rules; for instance, in O 18 r 19; O 14, and more.

[41] It will be quite wrong to read into the statutory provisions what is patently not in the provisions. Attempting to read by way of implication or inference is equally impermissible. This has been repeatedly reminded when interpreting and construing statutes, even under the guise of purposive interpretation as prescribed under s 17A of the Interpretation Acts of 1948 and 1967.

[42] What is envisaged under CIPAA is the utilisation of two sets of documentation exemplifying the two distinct and discrete processes under the statutory adjudication regime. The first set of documentation is known as the payment claim issued by an unpaid party and the payment response issued by a non-paying party, provided under ss 5 and 6. These documents are exchanged between these parties. It is in s 5(2) that the law provides what needs to be set out in the payment claim:

> 5(2) The payment claim shall be in writing and it shall include —
>
> (a) the amount claimed and due date for payment of the amount claimed;
>
> (b) details to identify the cause of action including the provision in the construction contract to which the payment relates;
>
> (c) description of the work or services to which the payment relates; and
>
> (d) a statement that it is made under this Act.

[43] In a sense, the payment claim may be likened to a letter of demand. At this stage, there is no payment dispute as yet to refer to adjudication. Under s 6(1), a non-paying party may well admit a payment claim and pay up either the whole or whatever amount is admitted. If that happens, nothing goes to adjudication as a dispute resolution mechanism. The claim is simply settled and that is the end of the matter. Or, the non-paying party may just not pursue the claim any further.

[44] Where a dispute arises from the payment claim made under s 5, either wholly or partly or where there is no payment response at all (in which case it is deemed denied), either the unpaid party or the non-paying party may refer that dispute to adjudication — see s 7(1). The initiation of adjudication itself is by the service of a notice of adjudication. Section 8 requires that notice to contain 'the nature and description of the dispute and the remedy sought together with any supporting document on the respondent'. Thereafter, an adjudicator will be appointed — see ss 8(2) and 21.

[45] After the adjudicator has been appointed, the claimant, defined in s 4 as 'an aggrieved party in a construction contract who initiates adjudication proceedings', is now required to serve a written adjudication claim. This is the second set of adjudication documentation. This time, s 9 requires that adjudication claim to 'contain the nature and description of the dispute and the remedy sought together with any supporting documents on the respondent'. It is to be remembered that the respondent may be the unpaid or non-paying party, depending on who initiated the adjudication. Regardless, the 'respondent' is required to serve an adjudication response (s 10); to which the claimant may response with a written reply under s 11.

[46] What then is the difference between a payment claim and an adjudication claim? This was discussed in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* where according to the Federal Court, the adjudication claim broadly outlines the 'nature and description of the dispute along with the remedy sought' whereas the payment claim contains the details of the claim so that the cause of action can be discerned:

> [44] It should be noted that on the claimant's side, the adjudication claim under s 9(1) of the CIPAA requires the unpaid party to state 'the nature and description of the dispute and the remedy sought' whereas the preceding payment claim under s 5 of the CIPAA merely requires him to state the amount claimed and the contract involved sufficiently to 'identify the cause of action'.

[47] It is the dispute that arises from the payment claim that the adjudicator is required to adjudicate upon, decide and deliver the adjudication decision within the time prescribed after conducting the adjudication in the manner as the adjudicator considers appropriate using the powers conferred under s 25. This is apparent from ss 12(1) and (2).

[48] Since it is the dispute that arises from the payment claim and not the payment claim itself per se that is referred to adjudication, it would be erroneous and misleading to describe or characterise the payment claim and the payment response as pleadings. In fact, I would venture to say even the adjudication claim and adjudication response are not pleadings as one understands pleadings to be under the rules of civil procedure. Consequently, the strict rules of pleadings do not apply in adjudication.

[49] Although s 5 requires the details such as the provision(s) in the construction contract to which the payment relates to be set out, and this is not affected by the presence of the term 'shall', this lack of particularity or specificity (especially of cl 36.6 of the construction contract) is, in my mind, not at all fatal, contrary to the finding of the Court of Appeal. While s 5 provides for certain requirements to be set out in the payment claim, it is silent as to how much detail should be provided.

[50] Chow Kok Fong in his work, *Security of Payments and Construction Adjudication* (3rd Ed, LexisNexis 2022, p 261) writes that the 'better view is that, subject to the payment claim being compliant with the requirements of the SOP Act and the SOP Regulations, a claimant is not obliged to provide more information in his payment claim than he considers necessary for the respondent to understand the thrust of the claim'. From all accounts, the respondent clearly understood the thrust of the appellant's claim for professional fees and had no problem at all, responding to the claim in a meaningful manner as is obvious from the payment response, and later from the adjudication response issued.

[51] One must understand and appreciate the statutory adjudication regime as a whole, how it operates and the conditions of application including the timelines involved, as discussed above, such that the specificity of the contract provisions need not even be exhaustive. In fact, it may even be the wrong provisions cited and the adjudicator may or may not agree with those provisions; may or may not deal with any or all the provisions cited; and/or the provisions cited may not even be of any concern to the responding party; as was the case in the present appeals.

[52] This is not a case of the appellant not citing any provisions of the construction contract. The appellant did identify particular clauses of the construction contract (including cl 36.6 — see subsequent discussion) and the fact that the adjudicator, assuming for a moment had determined the claim upon that clause, which I find he actually did not, is not at all fatal to the appellant.

[53] As mentioned, this is not a situation where the appellant had failed to comply with s 5(2)(b); it did but the appellant is said to have not specified cl 36.6. How can any reference by the adjudicator to that clause amount to a fatal omission on the part of the appellant? In civil litigation, it is so called 'fatal' where a party relies on an un-pleaded issue; it is not when the court or the judge does. That reference or reliance by the court or judge may be some judgment error probably capable of correction by an appellate court but it is not fatal to the court or judge.

[54] Consequently, the Court of Appeal was clearly in error when it concluded that the adjudicator's reference or reliance to cl 36.6 was fatal to the appellant. I will return to this issue when dealing with the jurisdiction and powers of the adjudicator but for now, it is my view that the Court of Appeal had taken a pedantic technical approach without proper and due regard to the whole scheme, the intent of CIPAA, its operation and application in the terms as discussed above; and had quite clearly misdirected itself.

[55] In this regard, the approach of the Australian courts on the matter of how much needs to be specified or particularised in a payment claim is also of helpful assistance. In *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136, the New South Wales Court of Appeal cautioned against taking an unduly technical approach on the degree of specificity; that the statutory provisions on this requirement should be given their normal and natural meanings:

> As the words are used in relation to events occurring in the construction industry, they should be applied in a common-sense practical manner.

[56] This 'common-sense' approach on the construction of the requirements as to form has been followed in other States of Australia where statutory adjudication is in force. See for instance, *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258; and *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248.

[57] In *Protectavale*, the Federal Court of Australia indicated that the payment claim must be sufficiently detailed to enable the non-paying party to understand the basis of the claim; adding that 'if a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. That is to say, a payment claim must put the principal in a position where he is able to decide whether to accept or reject the claim, and if the principal opts for the latter, to respond appropriately in a payment schedule ... That is not an unreasonable price to pay to obtain the benefits of the statute'. The equivalents of 'principal' and the 'payment schedule' are the 'non-paying party' and 'payment response' under our CIPAA.

[58] What is of further relevance is the background of the parties involved in the adjudication regime. In *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, Palmer J held that the precision and peculiarity of a payment claim need not approach that of a pleading in court because of the backgrounds of the parties normally encountered in a construction contract and the fact that the payment claim and payment response had to be produced quickly. His Lordship however held that the information provided should be 'sufficient to apprise the parties of the real issues in the dispute':

> A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of the construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim, a payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and

particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.

[59] McDougall J took a similar approach in *Leighton v Arogen* [2012] NSWSC 1323:

> It may be accepted that payment claims and payment schedules are to be understood as the parties to the relevant construction contract would have understood them. Thus, documents which appear to be extremely summary, or to the uninformed but not unintelligible observer brief to the point of incomprehensibility, may be sufficiently meaningful to the parties to enable them to know, respectively, the bases on which a particular payment claim is advanced and the bases on which it is opposed.
>
> In this context, it may well be appreciated to take into account, in particular factual circumstances, the background knowledge of the parties (for example) by correspondence passing between them before and at the time the payment claim and payment schedule were exchanged ...

[60] In yet another case authority, in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, Nicholas J stated that the purpose of the requirement is that a respondent served with a payment claim is provided with adequate information to enable a payment schedule to be filed in response to the claim.

[61] Although the statutory adjudication regime in New South Wales differs in some respects, the overall scheme and intent is similar; and I find these authorities of much persuasive sense and authority.

[62] Locally, there is the decision in *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242; [2017] 1 LNS 177 where Lee Swee Seng J (as His Lordship then was) cautioned against taking a strict view of the contents of the documentation in CIPAA:

> [57] The court should not exact a stricter requirement of pleadings on adjudication than if it were a court proceeding. One should not be unduly critical or technical to the point of exacting an overly demanding treatment of a payment claim when it comes to whether it has met the requirements of s 5(2)(b) of the CIPAA ...
>
> [58] Moreover the payment claim is prepared by the claimant itself and not served through solicitors. Section 8(3) further allows a party in the adjudication proceedings to represent himself or by appointing his representative. The intent is to save costs and not to make it unduly technical or convoluted ...

[63] I agree with the views subscribed in *Terminal Perintis*, finding it to be sound and of common-sense. See also discussion on this in *Construction*

Adjudication in Malaysia by Lam Wai Loon & Ivan YF Loo (3rd Ed Sweet & Maxwell, paras 388–398).

[64] Under CIPAA, the details required to be set out in the payment claim are those that will identify the cause of action. In *Terminal Perintis*, Justice Lee opined:

> [59] No doubt the expression of a 'cause of action' is used in s 5(2)(b) of the CIPAA but that is nothing more than saying that the claimant must set out the basis of their claim in contract.
>
> ...
>
> [61] If the payment claim were to be a statement of claim, I do not think that the defendant would be able to strike out the claim on the ground that there is no valid cause of action pleaded. In fact the test would be that the court assumes the pleading of facts to be true and based on such a plea, would there by a cause of action. I do not think we should exact a stiffer requirement of adjudicators when it comes to determining whether there was a valid payment claim for the adjudicator to assume jurisdiction. Beyond that, it becomes a question of evidence and finding of fact or a mixed question of fact and law which this court has no business to interfere unless the grounds for setting aside are made out under s 15 of the CIPAA. Whether or not the claim could succeed would be for trial in a case of litigation in as much as in an adjudication, it would be for the adjudicator to decide.

[65] In my view, the inclusion of the words 'including the provision in the construction contract to which the payment relates' in s 5(2)(b) is actually intended to be illustrative of what those details may be. The reason why the cause of action has to be identified is so that the non-paying party is able to respond to the claim for work done or services rendered. Consequently, the details set out should be 'sufficient for the respondent to meaningfully verify or reject the claim'; that the details are 'adequate' to enable the respondent to respond to the payment claim. And, as already pointed out, the respondent had absolutely no difficulty at any stage, be it at payment response or adjudication response.

[66] This construction is not altered by the presence of s 27 which reads as follows:

> 27(1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.
>
> (2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to adjudication pursuant to sections 5 and 6.

[67] Section 27 states that the jurisdiction of the adjudicator in relation to any dispute is limited to the matter referred to adjudication pursuant to ss 5

and 6. The matter in dispute which was referred to adjudication in these appeals was the claim for professional fees due under a terminated contract. That is as clear as daylight and the respondent was fully aware of that being the real and sole issue. Furthermore, it was totally able to give a meaningful response to that claim.

[68] In my view, non-citing or even the citing of a wrong clause or provision of a construction contract does not and cannot render the adjudicator bereft of jurisdiction. It is the absence of a matter in dispute between the parties which may have that effect but that is not at all the case here. As mentioned, the matter in dispute in the present appeals is the payment for the professional fees; the appellant asserting that this payment is due and payable on a terminated contract while the respondent denies the same. It is this lack of consensus or put another way, the presence of a dispute or a matter in dispute which forms the appellant's cause of action for payment for professional fees under a terminated contract.

[69] An examination of the payment claim and even the ensuing documents confirms the above analysis. In fact, I must add that all along, cl 36.6 was already cited in the payment claim and adjudication claim. Had these documents been properly examined, the Court of Appeal would clearly not have come to the decision that it did.

[70] In this regard, care must be taken to scrutinise the claim and its accompanying documents, appreciate and understand their contents and not merely cast a cursory view over them. There is a difference between scrutinising for that purpose as opposed to examining and interfering in findings in those documents, including the adjudication decision. This scrutiny is necessary especially where there is a myriad of details raised.

[71] In the payment claim, the appellant sets out details of its claim for payment under the following captions:

(A) the parties;

(B) the construction contract between the parties;

(C) status of the contract;

(D) the background prior to this payment claim;

(E) the computation of amount claimed; and

(F) the amount claimed is due and payable.

[72] It is relevant to note that in describing the parties at (A), the appellant cited the construction contract as well as a host of other documents; amongst

which are letters exchanged between the parties. The letters from the appellant are dated '5 December 2016, 13 December 2016, 20 December 2016, 16 January 2017 and 17 January 2017' whilst the letters from the respondent are dated '15 May 2017 and 15 September 2017'. These letters were attached to the payment claim and were subsequently before the adjudicator. These letters are part and parcel of the payment claim and their contents must be carefully examined.

[73] Next, the appellant's claim for professional fees arises in the context of a terminated contract, terminated by the appellant on account of an alleged default by the respondent. Hence, its reliance on cll 55, 56 and 28, in particular cl 55(b) — see paras 5, 24 to 31 of the payment claim. According to the appellant, where the construction contract is terminated, the respondent 'ought to have within reasonable time, certified the final claim amount submitted' by the appellant — see para 28. A draft statement of final account where the project surveyor had recognised and endorsed the amount of RM795,013.78 as the amount of professional fees due for payment by the respondent was relied on by the appellant — see para 25 of payment claim.

[74] At para 29, the appellant claimed to have made numerous verbal demands and sent written demands for payment dated 2 October 2017, 21 November 2017 and 19 December 2017. The respondent's inaction, deafening silence and non-reply is said to be 'indicative of the non-paying party's acceptance of the aforesaid sums and heads of claim ...'.

[75] To all this, the respondent served a payment response arguing that the claim 'is totally without merit' for the following reasons:

(a) the draft statement of final account was never submitted by the respondent to the appellant — para 3;

(b) there is a revised final draft account where the appellant's claim 'have been totally deleted' — paras 4 and 6; and

(c) the claim for professional fees does not fall within the meaning of 'construction contract' under s 5(1) of the CIPAA; that in short, CIPAA has no application — para 5.

[76] In the adjudication claim, the appellant went into detail on inter alia:

(a) background of the construction contract;

(b) history of adjudication claims successfully initiated against the respondent (four in total) in view of non-payment of progress claims by the respondent;

(c) termination of the construction contract;

(d) respondent's complaint of 'under grade concrete' which 'is without merit' in light of the independent consultant's report;

(e) recommendation and valuation of payment for the professional fees in the draft statement of final account by the project surveyor;

(f) challenge on the revised statement of final account issued after the project surveyor's recommendation for payment as 'an afterthought and with a collateral purpose ... suspicious, without substantive basis and clearly a tool to undermine and defeat the claimant's valid and justified claim against the respondent'; and

(g) reliance on cll 28, 55 and 56 of the construction contract.

[77] Once again, the appellant's letters dated 5 December 2016, 13 December 2016, 20 December 2016, 16 January 2017 and 17 January 2017 were enclosed and collectively marked as encl 19 — see para 30 of the adjudication claim.

[78] The respondent served an equally detailed adjudication response. Amongst the issues raised were:

(a) there was a history relating to 'understrength concrete strength' and an assertion that there was a failure by the appellant to carry out concreting in accordance with the contract specifications;

(b) the consultant's report is disputed;

(c) crucial provision of the construction contract is cl 36.5;

(d) other relevant provisions being cll 1.2(a), 3.3, 5.1(b), 5.2, 6.1, 10.0(a), 31.0 and 33.0; which the respondent noted appellant was not invoking;

(e) appellant must bear the costs of the professional fees because the appellant itself initiated the production of the reports in question by its own consultants;

(f) abuse of process as the claim ought to have been the subject matter of adjudication claim No 4;

(g) clauses relied on by the appellant not relevant as the termination 'was and is unlawful'; and

(h) there is no valid certificate or document to support the claim for professional fees.

[79] There is a detailed adjudication reply where the appellant reiterated its 'stand and position'; and, inter alia, claimed that the concreting issue was a 'design fault' and not due to 'under grade concrete'; that from the line of correspondence in encl 23, the engagement of the consultant was 'with the

knowledge, instructions and approval from the respondent', especially instructions vide letters dated 26 August 2016 and 9 December 2016.

[80] A fuller picture of the dispute and the concerns raised emerges when one examines the correspondence exchanged, especially the letters sent by the appellant — see para [72] above. In my opinion, these letters are necessarily part of the payment claim and adjudication claim and due and proper regard must be given to them. When examined, it puts paid to the respondent's complaints about cl 36.6, supposedly referred to by the adjudicator 'unilaterally'. This is actually incorrect on the facts.

[81] The letters show that the appellant had actually invoked cl 36.6 of the construction contract amongst several other provisions — see letters dated 16 January 2017 and 17 January 2017.

[82] This is letter dated 16 January 2017:

> Our Ref. ACSB/JKP/01/302
>
> Date: 16th January 2017
>
> En. Azman bin Ibrahim
>
> Chief Executive Officer
>
> JKP Sdn Bhd
>
> No. 128, Bangunan Menara UMNO Jalan
>
> Macalister
>
> 10400 Pulau Pinang
>
> CADANGAN MEMBINA DAN MENYIAPKAN SATU (1) PANGSAPURI 24 TINGKAT KOS SEDERHANA (382 UNIT) DI ATAS TANAH TEBUSGUNA KERAJAAN NEGERI, KAMPUNG PISANG AWAK, SEKSYEN 4, BANDAR JELUTONG, DAERAH TIMUR LAUT, PULAU PINANG
>
> RE: OUTSTANDING PAYMENT FOR PROFESSIONAL FEE UNDER CLAUSE 36.6
>
> Your consultant's SSJ Consulting Engineers Sdn Bhd (SSJ/14/JKP-PISANGAWAK/ACSB/24) dated 26th August 2016 is referred.
>
> You have, through your consultant; SSJ Consulting Engineers Sdn Bhd; required us to carry out further tests for the issue mentioned in the above stated letter dated 26th August 2016.
>
> We have vide our letter (ACSB/JKP/01/286) dated 5*th* December 2016 notified you our intention to claim under clause 36.6 of the Conditions of Contract for the Professional Fee by Perunding Kejuruteraan MSY in the amount of RM11,660.00.
>
> We shall include this claim in our next interim payment application. Thank you.

Yours Faithfully,

.....

Dato' Mohamed Iqbal S. Habeeb Noohu (D.S.D.K)

Managing Director

[83] This is letter dated 17 January 2017:

Our Ref: ACSB/PKP/01/306

Date: 17th January 2017

En. Azman bin Ibrahim

Chief Executive Officer

JKP Sdn Bhd

No. 128, Bangunan Menara UMNO Jalan Macalister

10400 Pulau Pinang

CADANGAN MEMBINA DAN MENYIAPKAN SATU (1) PANGSAPURI 24 TINGKAT KOS SEDERHANA (382 UNIT) DI ATAS TANAH TEBUSGUNA KERAJAAN NEGERI, KAMPUNG PISANG AWAK, SEKSYEN 4, BANDAR JELUTONG, DAERAH TIMUR LAUT, PULAU PINANG

RE: REPLY to NCR and SSJ's LETTER both dated 11th January 2017

The NCR ref no. JKPSB-FORM-PP-16 and SSJ Consulting Engineers Sdn Bhd's letter both dated 11th January 2017 are referred.

We hereby notify that your NCR and letter stating the concrete core lest results failed need your reconsideration because as indicated by our consultant's advice in accordance to the B.S Code a lower concrete test result than the specified concrete grade is not a definition of failure or non-conformance. In support thereof, a letter by Perunding ZNA is attached hereto as Schedule I for your perusal.

In additional you have, through your architect's letter (RMS/PG1003-2A/F/ANAS/45) dated 9th December 2016 required us to conduct further tests for the concrete issue and therefore we hereby invoke clause 36.6 of the Conditions of Contract. As the test report shows the concrete has not failed and so accordingly the cost incurred shall be borne by you in accordance with clause 36.6 of contract.

We shall submit our cost to you in another letter in due course and shall include the cost in our next interim payment.

For the above stated reasons, we hereby urge you to immediately withdraw the NCR. In the interim note that you have earlier issued us a stop work order. Thus we hereby invoke clauses (43) and (44) of the Conditions of Contract.

For the avoidance of double we deny any fallibility on the concrete issue.

Thank you.

.....

Dato' Mohamed Iqbal S. Habeeb Noohu (D.S.D.K)

Managing Director

[84] Although the payment claim and other related documents used in statutory adjudication are not in the nature of pleadings as practised in civil litigation, and this has already been extensively explained above, this correspondence was nevertheless cited in the payment claim — see para 4.6 of the payment claim and para 30 of the adjudication claim. In these two letters which form part of the payment claim and later adjudication claim, cl 36.6 was quite clearly cited.

[85] I must also add that it was in any case the respondent themselves who had cited cl 36 in their adjudication response — see para 18. Though the respondent had specifically identified cl 36.5, it is unreasonable to require or insist the adjudicator wears blinkered lenses and ignore the rest of cl 36. Having drawn the adjudicator's attention to cl 36.5, it is unreasonable to say that the adjudicator is not entitled to look at cl 36 as a whole; and worse, to subsequently claim breach of natural justice when he did.

[86] To this, I must further add that the whole construction contract was already before the adjudicator, 'pleaded' as it were and it will be naïve to suggest that the adjudicator is not entitled to look to the whole construction contract for all its full terms and effect. More so when he was dealing with the payment claim for professional fees in the context of a terminated contract. Clauses 55 and 56, indeed provide for consequences of termination and the need to certify costs, which the appellant complained was not undertaken by the respondent. Clause 55(c) certainly provides that the respondent 'shall pay' to the appellant:

(a) the value of the works carried out up to the date of termination;

(b) the amounts payable in respect of any preliminary items so far as the Work or service comprised therein has been carried out or performed and a proper proportion of any such items which have been partially carried out or performed;

(c) the cost of materials or goods reasonably ordered for the works which have been delivered to the contractor or of which the contractor is legally liable to accept delivery (such materials or goods becoming the property of the Government upon such payment being made to the contractor); and

(d) a sum being the amount of any expenditure reasonably incurred by the contractor in so far as such expenditure has not been recovered by any other payments referred to in this sub-clause.

[87] Bearing in mind that the merits of the dispute including the question of validity or otherwise of the termination by the appellant and whether there is

any breach of the construction contract by the respondent is determined elsewhere in arbitration and/or litigation, and that the decision in the statutory adjudication is intended to be of a temporary finality, it is immaterial that the invocation of cl 36.6 was in letters written before termination on 15.5.2017; or that the adjudicator was simply looking at the whole construction contract which was already placed before him by the parties. It is not as if the adjudicator was referring to a document which was not at all before him. This is quite aside from his extensive powers under s 25 which amongst others, allows him 'inquisitorially take the initiative to ascertain the facts and the law required for the decision'.

[88] Whilst the court in a setting aside application under s 15 of the CIPAA is not concerned with the substantive merits of the reliance on any of the provisions of the underlying contract and also findings of fact by the adjudicator, and this will include cl 36.6, the fact remains that cl 36.6 was actually cited in the 'pleaded' claim and was not plucked out of the air by the adjudicator, whether through cherry-picking or any frolic. It is also important to note that the respondent never disputed that reliance; whether in the payment response or adjudication response; or even in its correspondence.

[89] Thus, on the facts, the Court of Appeal was clearly in error when it concluded that cl 36.6 was not raised or 'pleaded'; that the adjudicator had unilaterally relied on cl 36.6 and had gone on a frolic of his own thus acting without jurisdiction and committed a material breach of natural justice. On the contrary, the payment claim clearly complied with the statutory requirements and the respondent was not in any way impaired or unable to respond to the claim.

[90] For all the reasons above, question 1 must be answered in the negative.

[91] I move then to question 2, that is, 'Whether the dicta in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2017] 8 AMR 167 prohibits an adjudicator from referring to a specific clause in a construction contract when allowing a claim, when the said clause was not specifically stated in the payment claim and adjudication claim by the claiming party?'

[92] In view of my answer and reasons in relation to question 1 and my further finding that cl 36.6 was actually 'pleaded' or raised in the payment claim as well as in the adjudication claim, question 2 actually does not arise.

[93] Be that as it may, I note that the Court of Appeal had relied on this court's decision in *View Esteem* to hold that the adjudicator's jurisdiction is limited to the cause of action identified in the payment claim; that because the appellant had failed to plea cl 36.6, the adjudicator had no jurisdiction to

adjudicate on the said clause. Paragraphs 55–58 of *View Esteem* were cited in support:

> [55] By s 27(1) of the CIPAA, the arbitrator's [sic] jurisdiction 'is limited to the matter referred to adjudication' pursuant to ss 5 and 6 of the CIPAA. It refers to the 'identification of the cause of action' in relation to the construction contract as required under s 5(2)(b) of the CIPAA. In turn, the payment response under s 6 of the CIPAA is defined and limited by the claim under s 5 of the CIPAA.
>
> [56] In short, s 27(1) of the CIPAA refers to the subject matter of the claim under s 5 of the CIPAA, which is the 'cause of action' identified by the claimant by reference to the applicable clause of the construction contract. Thus, if the payment claim relates to progress claim No 28 (as in the present case), the jurisdiction of the adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to progress claim No 28.
>
> [57] It can thus be said that the appellant's case regarding the jurisdiction referred to in s 27(1) of the CIPAA, is the subject matter of the claim and the cause of action as that identified under the relevant provision of the construction contract. By s 27(2) of the CIPAA, the parties may by consent extend the jurisdiction of the adjudicator to cover other matters. A typical example will be that of other progress claims falling due before the adjudication commences. Section 27(1) of the CIPAA has nothing to do with the grounds of the claim or the reasons for opposing the claim,
>
> [58] In contrast to jurisdiction, the 'powers' of the adjudicator are listed in ss 25 and 26 of the CIPAA under the specific heading of 'Powers of the Adjudicator'. It follows that an adjudicator may exercise all or any of the powers under ss 25 and 26 of the CIPAA so long as he keeps within his jurisdiction in adjudicating only the subject matter referred to him pursuant to ss 5 and 6 of the CIPAA.

[94] Relying next on s 9 of the CIPAA which the Court of Appeal said the Federal Court in *View Esteem* (paras [41] and [46]) regarded together with ss 10 and 11 as 'pivotal and not mere formal manifestations of the dispute', the Court of Appeal found the non-plea of cl 36.6 as 'fatal' to the appellant's case. At para [32], the Court of Appeal held that the 'adjudicator had acted in excess of his jurisdiction when he decided on matters never raised and pleaded in the PC, the payment response ('PR') and all the adjudication pleadings'.

[95] With respect to the Court of Appeal, that conclusion is erroneous. Aside from my earlier deliberations on the issue of 'pleadings' in adjudication, that there is none and certainly not 'pleadings' with the attendant principles and ramifications under the Rules of Court 2012 and the relevant caselaw, I find that the Court of Appeal has conflated subject matter jurisdiction as provided under s 27 with documentational and procedural requirements under s 5.

[96] I have dealt with this aspect to some extent earlier; that even if the adjudicator had for a moment and for argument's sake, referred to or relied on

cl 36.6 and such clause was not raised by the appellant in the payment claim or even the adjudication claim (the facts show otherwise) such reference or reliance is not fatal to the appellant's case by reason of non-compliance of s 5(2)(b). Section 5 deals with the requirements in a payment claim whilst s 27 deals with jurisdiction of the adjudicator. Both provisions are distinct and separate.

[97] The dicta in *View Esteem* has been mis-appreciated by the Court of Appeal. The Federal Court was actually correcting the reasoning of the High Court which had taken the view that the adjudication claim and adjudication responses were mere formal manifestations of the dispute already set out in the payment claim and the payment response. At the High Court, the appellant was disallowed from raising defences or issues in the adjudication response which were not raised in the payment response. In fact, the appellant had not served any payment response and under s 6(4) was deemed to have denied the claim. The Federal Court disagreed, holding that the appellant was entitled to raise any defence or issue not raised earlier as the existence of the two-stage process did not warrant giving a reduced importance to the adjudication pleadings and a greater, if not overriding significance to the initial documents, namely the payment claim and the payment response, under ss 5 and 6.

[98] The effect of this court's decision in *View Esteem* in respect of s 27 is simply this — that the adjudicator's jurisdiction in relation to any dispute is limited to the matter of the claim which was referred to adjudication under ss 5 and 6. The subject of the claim is the limiting factor. This was explained by the Federal Court to refer to the cause of action identified by reference to the applicable clause of the construction contract.

[99] An example was given to illustrate what this meant, that if the payment claim relates to progress claim No 28, then adjudicator's jurisdiction is limited to this progress claim 'and nothing else'. The payment response is likewise limited to an answer to this progress claim and no other. The details of the subject of the claim are those provided under s 5(2)(a) to (d). The Federal Court added that 's 27(1) of the CIPAA has nothing to do with the grounds of the claim or the reasons to oppose the claim'. I understand 'grounds of the claim' to be the supporting basis for the claim; and the insufficiency or absence of grounds do not deprive of the adjudicator of jurisdiction.

[100] In these appeals, the subject of the claim and the cause of action was always about the single dispute over the claim for professional fees. Nothing else. The jurisdiction of the adjudicator was to adjudicate on this subject claim and not say, adjudicate on the lawfulness of the termination, or even the issue of breach. The appellant had set out the amount, due date for payment, details of the cause of action for this claim for the professional fees with certain clauses

of the underlying contract identified, description of the work and, a statement that the claim is made under the Act. All this information had to be compressed or summarised as 'the nature and description of the dispute and the remedy sought' when preparing the adjudication claim, as required under ss 8 and 9.

[101] The respondent, not in the least confused and being fully aware of the thrust of the appellant's claim, put up a meaningful response. Unfortunately, none of the responses as detailed by the respondent passed muster with the adjudicator, and the claim was allowed. This, does not render the payment claim and ultimately the adjudication decision reached liable to be set aside for the reasons complained of by the respondent and agreed to by the Court of Appeal.

[102] Consequently, the answer the question 2 must also be answered in the negative.

[103] Finally, question 3: In a CIPAA award, does the adjudicator's consideration of a specific clause in the construction contract, not specifically stated in the payment claim or adjudication claim, without inviting parties to further submit on the said clause, amount to a breach of natural justice or an act excess in jurisdiction, such that the said award ought to be set aside?

[104] Once again, I refer to my earlier findings that the existence of cl 36.6 which purportedly formed the basis of the adjudicator's decision was actually cited in the payment claim. Hence, there was and is no basis for the respondent's complaint and the disposal in the manner that the Court of Appeal did.

[105] Again, for the development of the law, I will nevertheless answer this question. And, once again, my answer is in the negative for the following reasons.

[106] It is unfortunate that principles more commonly associated with public law are now more frequently resorted to in the field of private commercial law where bargains are struck at arm's length and with consideration. Although these principles may apply in appropriate circumstances and conditions with legislation such as CIPAA providing for its invocation for the setting aside of adjudication decisions as was the occasion in these appeals (see s 15), the law surrounding their application actually is necessarily different.

[107] The principles of natural justice are normally understood in relation to the fairness of the procedures involved; the concept of *audi alteram partem* and *nemo judex in sua causa*, that there must be a fair hearing and no bias or conflict of interest on the part of the adjudicator. It would be wrong to say that these

principles do not apply to adjudication proceedings; they obviously do. To a large extent, these principles as applied in the field of arbitration apply equally to adjudication. However, the extent to which the rules of natural justice apply depends on the circumstances.

[108] Several decisions of one of the earliest jurisdictions to implement statutory adjudication, that is the United Kingdom under its Housing Grants, Construction Regeneration Act of 1996, provide some helpful guidelines on this area of law.

[109] In *Balfour Beatty Construction Ltd v Lambeth London Borough Council* [2002] EWHC 597 (TCC), Humphrey Lloyd QC held that the principles of natural justice applied to adjudicators and adjudication but these should relate to matters which are either decisive or of considerable importance to the outcome and not peripheral or irrelevant. In other words, it is the test of materiality:

> Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable to adjudication but, in determining whether a party has been treated fairly or in determining whether an adjudicator has acted impartially, it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties *must be one which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant.* It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality or of fairness in adjudication must be considered in that light. It has become all the more necessary that, within that rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. The provisional nature of the decision also justifies ignoring non-material breaches. Such errors, if apparent (as they usually are), will be rectified in any negotiation and settlement based upon the decision. The consequence of material issues and points is that the dispute referred to adjudication will not have been resolved satisfactorily by any fundamental standard and the chances of it providing the basis for a settlement are much less and the chances of it proceeding to arbitration or litigation are much greater. However the time limits, the nature of the process and the ultimately non-binding nature of the decision, all mean that the standard required in practice is not that which is expected of an arbitrator. Adjudication is closer to arbitration than an expert determination but it is not the same. (Emphasis added.)

[110] Next, *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358; [2006] BLR 15, where Chadwick LJ opined that it was not the task of the adjudicator to act as arbitrator or judge. According to His Lordship, the statutory scheme had subordinated the need to have the 'right' answer to the need to have an answer quickly, that:

> The objective which underlies the 1996 Act and the statutory scheme requires the Courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the Courts will interfere with the decision of the adjudicator.

[111] In *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC), Akenhead J rejected the complaint that a failure by the adjudicator to allow one of the parties a reasonable opportunity to make submissions and adduce evidence in relation to the claim for prolongation costs amounted to a breach of natural justice. According to His Lordship, a breach of natural justice must first be established. But that is not enough to set aside an adjudication decision. The breach, if established, must be more than peripheral; it must not be irrelevant but be material in that it is either or of considerable importance to the outcome of the resolution of the dispute.

[112] Whether the issue is decisive or of considerable potential importance, is peripheral or irrelevant is a question of degree which must be assessed by the judge. It is only if the adjudicator goes off on a frolic of his own, decide the case on a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or put in relevant evidence, if appropriate, that the breach may be said to be material rendering the decision reached liable to be set aside.

[113] Similarly, in *Primus Build Ltd v Pompey Centre Ltd and another* [2009] EWHC 1487 (TCC), it was held that any alleged breach of natural justice must be examined critically for materiality and significance to the decision actually made by the adjudicator. It must go to 'the heart of the adjudicator's decision'.

[114] In my view, if the 'frolic' of the adjudicator makes no difference to the outcome, the decision must be enforced — see also *Herbosh-Kiere Marine Contractors Ltd v Dover Harbour Board* [2012] EWHC 84 (TCC); *ABB Ltd v Bam Nuttall Ltd* [2013] EWHC 1983 (TCC); *Roe Brickwork Ltd v Wates Construction Ltd* [2013] All ER (D) 105; *AECOM Design Build Ltd v Staptina Engineering Services Ltd* [2017] EWHC 723 (TCC).

[115] In these appeals, the reference by the learned adjudicator to cl 36.6 did not have the same materiality or significance. Quite aside from the fact that the parties, especially the respondent was fully aware of the entire cl 36, it was also a matter of contractual construction which the adjudicator was entitled to decide.

[116] It is thus, a relatively high threshold that must be crossed before the complaint is sustainable.

[117] In Australia, the position is very much the same. The New South Wales Court of Appeal required that there should be substantial denial of natural justice to the same level as a 'basic and essential requirement' which underpins the enforceability of an adjudication determination; that there must be materiality in the breach complained of — see *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394; and *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152.

[118] In *Shellbridge*, Barrett J commented that 'It cannot be intended that an adjudicator working to the tight statutory timetable will be as painstaking as a judge who has reserved judgment in a case involving the same claims under the same construction contract. The statutory intention is that the adjudicator is to work quickly and this may militate against the standards of thoroughness and detail generally expected in arbitration or litigation. There is the added factor that adjudicators are not necessarily legally qualified, and the parties not legally represented or may have prepared the documents themselves — see *Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168, where McDougall J opined that 'fairness is not abstract but practical ... the concern of the law is to avoid practical injustice'.

[119] In *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd* [2012] NSWCA 31, the complaint of procedural unfairness related to the lack of opportunity to make submissions on a case authority relied on by the adjudicator. The NSW Court of Appeal scrutinised the records and concluded that the adjudicator's consideration of a case authority which was not cited by either party did not make any difference to the conclusion reached based on the evidence before him and so the complaint was rejected and the enforcement ordered. See discussions of this case in *ABC Glass & Aluminium Pty Ltd v Nik Nominees Pty Ltd* [2019] QSC 171 by the Queensland Supreme Court.

[120] Singapore has followed that same approach generally adopted in arbitration jurisprudence with Judith Prakash J leading the way in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733; [2009] SGHC 257 ; followed by Vinodh Coomaraswamy J in *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103; [2016] SGHC 222.

[121] After examining the various jurisdictions on this thorny issue, Chow Kok Fong in his *Security of Payments and Construction Adjudication* (3rd Ed, LexisNexis 2022, at p 732) concluded that:

> ... the bar for challenging a tribunal's decision on the ground of breach of natural justice is high. Again, drawing from the position in arbitration, the Courts are alive to attempts to disguise what is in substance 'an appeal on the legal merits' of an arbitrator's (or in this case adjudicator's) decision as a challenge on the grounds of

procedural fairness. In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*, the Court of Appeal accepted the submission that 'an award should be read generously such that only meaningful breaches of natural justice that have actually caused prejudice are ultimately remedied. As succinctly stated in a leading arbitration text, 'the issue is whether the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference in his deliberations'.

Furthermore, even in arbitration, it is considered that the concept of a party's right to be heard should not be subject to the same rigours of the same concept as understood in administrative law. Arbitration has been rightly distinguished as being much less concerned with protecting the vulnerable against arbitrary governmental or quasi-governmental action as a dispute resolution process. It has been said that one of the objectives of international arbitration is for businesses to achieve 'expeditious, economical and final determination'. While an adjudicator's determination enjoys only temporary finality, the objectives of expedition and economy are perhaps even more deeply entrenched in the legislative intent behind the Singapore SOP Act.

[122] Again, the threshold is high. What then is the position in Malaysia? Here, I will similarly draw on the relevant jurisprudence in arbitration for this third question. In this regard are the two latest decisions of this court on this same issue raised in arbitration — *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1 and *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198.

[123] In *Pancaran Prima Sdn Bhd*, this court dealt with a similar complaint of breach of natural justice by looking at the right of the arbitrator to draw from his own knowledge and expertise on any fact in issue which the arbitrator is acquainted with. Having done so, the Federal Court concluded that the arbitrator was entitled to draw from his own expertise and the allegation of breach of natural justice was rejected. In *Master Mulia Sdn Bhd*, the Federal Court affirmed the decision of the Court of Appeal which had set aside an arbitration award on the ground that there was a material breach of natural justice. A claim which would have been otherwise dismissed was instead allowed by the learned arbitrator who relied on a different causative aspect, that aspect or point being one which was drawn from the arbitrator's own expertise but which he did not alert the parties or invite their comments before making his award.

[124] Vernon FCJ writing the judgment of the Federal Court in *Master Mulia Sdn Bhd* examined the principles behind the UNCITRAL Model Law which underlay the Arbitration Act of 2005 (Act 646) and the approach adopted by several other jurisdictions when dealing with an application to set aside an arbitration award on the ground that there was a breach of natural justice. At para 53, His Lordship set out the following guiding principles:

[53] In the light of the above we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows:

(a) first, the court must consider: (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;

(b) second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;

(c) third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;

(d) fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;

(e) fifth, where the breach is significant and might have affected the outcome, the award may be set aside;

(f) sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;

(g) seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact. Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the court; and

(h) eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice.

[54] Underlying these guiding principles is the policies and objectives of the New York Convention and the Model Law. As a matter of principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process. The role of courts in the arbitral regime in general is one of assistance supportive of the arbitral process and not one of interference with it. Bearing in mind the two primary objectives of the Model Law (respect for and preservation of party autonomy and ensuring procedural fairness), the courts do not review the merits of the arbitral tribunal's decision.

[125] I find these principles equally persuasive and applicable when dealing with applications to set aside adjudication decisions on the ground that there is a breach of natural justice. In any case, the English decision of *Cantillon* as discussed above was relied on and followed in *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] 1 LNS 1435 and *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case* [2017] 7 MLJ 732; [2016] 5 CLJ 882. The tests set out in *Cantillon* was acknowledged and

supposedly followed by the Court of Appeal in the present appeals — see para [37].

[126] However, I noticed that in holding that there was a breach of natural justice, the Court of Appeal merely looked at the matter of 'pleadings', that because cl 36.6 was not 'pleaded' in the payment claim, the learned adjudicator had gone on a frolic of his own by 'relying on an un-pleaded clause 36.6', that he had committed a material breach of the rules of natural justice by failing to notify or bring to the attention of the parties that he was relying on that clause. The Court of Appeal found that cl 36.6 was the 'basis of his decision to allow the respondent's claim'.

[127] With respect, the Court of Appeal could not be more wrong not only for the reasons already discussed but because the learned adjudicator actually did not allow the appellant's claim based on that clause. There was a whole lot more. Clause 36.6 was also not a material but a peripheral issue. It was neither decisive nor of considerable importance as it did not make any difference to the conclusion reached.

[128] The appellant's claim was allowed for this one simple reason as seen at para 105 of the adjudication decision – 'that the Claimant has proved on a balance of probabilities, and that the Respondent shall pay the cost of Independent Consultants which [sic] engaged by the Claimant in produced [sic] the relevant report as instructed by the Respondent's consultants'. At para 104, the adjudicator found cogent proof demolishing, so to speak, the 'three essential grounds' raised by the respondent in opposing the claim – cl 36.5; no proof of any AI or EI or any relevant directions issued by the respondent's consultants; and the absence of a certificate issued by the respondent and/or its consultants of the sum payable for this claim of professional fees.

[129] The respondent had raised cl 36.5 as the correct and crucial provision but the learned adjudicator was of the considered opinion that 'clause 36.6 of COC are [sic] is the one most applicable to the Claimant's claim'. It is clear that the adjudicator did not say that this was the applicable provision or that it was the only applicable contractual term; he simply said that it was 'most applicable'. That, in my understanding, means what it says but it does not mean that the clauses cited by the appellant are not applicable at all. It must not be overlooked that the appellant's claim was one made post-termination; hence its reliance on cll 55 and 56 and invocation of rights and remedies pursuant to those clauses whereas cl 36 arguably may arise sans termination.

[130] In my view, it is the second ground that was material and made the difference to the conclusion reached. In response to the respondent's defence as reflected in the payment and adjudication responses, that there were no

instructions given, the appellant had led documentary evidence of instructions from the respondent or its consultants for the production of the report which underpins the claim for professional fees.

[131] The learned adjudicator examined these various pieces of documentary evidence, namely the consulting engineer's letter dated 26 August 2016 and the architect's letter dated 9 December 2016. Both letters separately required the appellant to 'mengemukakan laporan berkenaan bagaimana retakan yang telah berlaku dan tindakan yang sewajarnya akan diambil bagi membaiki retakan' and 'menyediakan dokumentasi berikut ... lapuran lengkap mengenai masalah integriti konkrit ...'. These two letters provided cogent proof of work done as per the respondent and/or its consultant's instructions.

[132] At para 103, the learned adjudicator found that 'based on the above instruction, the Claimant has done so accordingly by producing a relevant report to the respondent and respondent's consultant ...'. The adjudicator further found at para 104, that the independent consultant had 'certified and endorsed that the building is safe and this would have meant that the Claimant has carried out the construction work are [sic] in accordance to the Contract'.

[133] Quite apart from the fact that the adjudicators are masters of the facts found by them upon examination of evidence led by the parties, and despite the issue of validity of termination and differences of reports produced by the parties to be determined elsewhere, I have no reason to disagree with the adjudicator or doubt that these letters firmly prove the appellant's claim for professional fees. The citing and reference to cl 36.6 is peripheral, almost a red herring.

[134] Without this documentary evidence or letters emanating from the respondent and/or its consultants themselves, cl 36.6 will not take anyone anywhere. Clause 36.6 has no real bearing on the outcome of the claim as cll 55 and 56 are sufficient to accommodate the claim. It is these letters which sealed the respondent's fate and there is clearly no breach of any rule of natural justice.

[135] Furthermore, the appellant and respondent are entirely familiar with their course of contractual works, more so having undergone no less than four earlier adjudication proceedings where more or less the same defences had been raised by the respondent. In each of those proceedings, the respondent's defences had been rejected and the appellant's payment or adjudication claims allowed.

[136] Consequently, consistent with the principles in *Cantillon*, adopted in *Ranhill E & C* and *Econpile* and similar principles found in arbitration jurisprudence as enunciated in *Master Mulia*, I have no hesitation in answering

this third question also in the negative.

[137] The high threshold which the respondent necessarily had to meet in view of the intent of CIPAA, its operation and application, was never met at all by the respondent, be it on the facts or even on the assumption that the learned adjudicator had referred to cl 36.6 unilaterally.

[138] Clause 36.6 which is part of cl 36 was drawn to the adjudicator's attention by the respondent itself. Clause 36 has sub-cll 36.1 to 36.6. It is artificial and totally impractical if not naïve to claim that the adjudicator cannot, with his inquisitorial powers under section 25, make his observations about some other subclauses of cl 36, including 36.6. The adjudicator is entitled to look at the whole of cl 36, and the rest of the construction contract. Such an examination is entirely permitted under the remit of *View Esteem*. The Court of Appeal had recognised the use of such powers in *Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd & Ors and another suit* [2018] MLJU 1912; [2018] 1 LNS 2078 earlier acknowledged in *WRP Asia Ltd v NS Bluescope Lysaght Malaysia Sdn Bhd*, and I agree to the proposition that adjudication proceedings involve inquisitorial inquiries and not adversarial process. The learned adjudicator was therefore not in breach of any rule of procedural fairness when he did not invite the parties, especially the respondent to comment on cl 36.6.

[139] The way allegations and complaints of breach of natural justice are treated and addressed by the courts in public law should not have the same foothold here in statutory adjudication dealing specifically with payment disputes in construction contracts, an entirely commercial arrangement. Other jurisdictions which have adopted statutory adjudication take the same approach, and our courts should do the same.

[140] In *Discain Project Services Ltd v Opecprime Development Ltd* [2000] BLR 402, it was recognised that for the statutory regime or system to work in practice, 'some breaches of the rules of natural justice which have no demonstrable consequence are disregarded'. Clearly, the complaint of breach of natural justice by the respondent in the present appeals is of no demonstrable consequence and must be disregarded.

[141] The position in Singapore under its Building and Construction Industry Security of Payments Act 2004 ('SOP Act') is no different. Rules of natural justice 'are not engraved on tablets of stone'; 'everything depends on the subject-matter'; as held in the Singapore decision of *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159. For fair play to apply, there must be real flexibility.

[142] The Singapore Court further added that 'Justice, whether performed by a court, a tribunal or any quasi-judicial body, is a balancing exercise between thoroughness and timeliness. More formal settings, such as litigation through a court, would tend to emphasise the former. The adjudication process under the SOP Act instead chooses a quicker, but somewhat less thorough means of achieving justice. This is a general theme which pervades the SOP Act and in itself is not a ground for saying that natural justice has been denied'. CIPAA has the same refrain and this approach too must be adopted in these appeals.

[143] Again, I refer to the earlier considerations that must be borne in mind — the purposive rule of interpretation, the particular industry that is under scrutiny, that is, the construction industry and the specific issue of payment claims, the familiarity of the parties with one another and the underlying construction contract, the fact that the parties had already undergone four previous adjudication proceedings and the defences raised by the respondent.

[144] The learned adjudicator's decision must be read as a whole and not cherry-picked by the respondent in the manner done. Had that been conducted as any reasonably circumstanced court hearing an appeal would have, it would have readily come to light that the appellant's claim for professional fees arose in the context of a terminated contract; that the monies are for work done under the construction contract.

[145] The learned adjudicator was also perfectly entitled to reach the conclusions that he did, and it is obvious reading the adjudication decision that he had carefully and almost exhaustively evaluated the evidence led against the construction contract and applying the legal principles to the evidence before concluding that the appellant's claim was proved.

[146] Further, the learned adjudicator's engagement of his inquisitorial powers was exercised adequately and commendably to reach the decision that the courts must endeavour to support and uphold for its interim finality. So long as the adjudicator confined himself to the dispute that was referred to him under s 5, even if he decides it wrongly, he has not exceeded his jurisdiction and there is no breach of natural justice. The decision remains binding and enforceable and must be enforced — see *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522, *UDA Holdings Bhd*; *Ceylon Builders Sdn Bhd v Ultimate Pursuit Sdn Bhd and another appeal* [2018] MLJU 1918.

[147] It should only be in rare circumstances that an adjudication decision is set aside — see *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another case* [2015] MLJU 1951. The circumstances complained of by the respondent plainly do not warrant intervention by the court and the Court of Appeal was plainly in error for intervening.

A CONCLUSION

[148] All three questions of law are thus answered in the appellant's favour. The appeals are thus allowed and the decisions of the Court of Appeal are set aside.

B

Nordin Hassan JCA (delivering majority judgment of the court):

[149] Anas Construction Sdn Bhd ('the appellant') filed two appeals before this court against the decisions of the Court of Appeal. Civil Appeal No 02(f)-3–01 of 2023(P) is against the decision of the Court of Appeal to set aside the decision of the High Court to allow the enforcement of the adjudication decision dated 12 September 2019 under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). Civil Appeal No 02(f)-4–01 of 2023(P) is against the decision of the Court of Appeal in setting aside the decision of the High Court in dismissing the respondent's application to set aside the said adjudication decision.

C

D

[150] This court on 3 January 2023 had granted the appellant's leave to appeal on the following questions of law, namely:

E

(a) do the strict rules of pleadings, as applicable in civil claims before the Malaysian Courts, apply in adjudicating proceedings under the Construction Industry Payment and Adjudication Act 2012?

F

(b) ahether the dicta in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2017] 8 AMR 167 prohibit an adjudicator from referring to a specific clause in a construction contract when allowing the claim when the said clause was not specifically stated in the payment claim and adjudicating claim by the claiming party? and

G

(c) in a CIPAA award, does the adjudicator's consideration of a specific clause in the construction contract, not specifically stated in the payment claim or adjudication claim, without inviting parties to further submit on the said clause, amount to a breach of natural justice or an act excess in the jurisdiction, such that the said award ought to be set aside?

H

THE BACKGROUND FACTS

[151] JKP Sdn Bhd ('the respondent') appointed the appellant as the main contractor for the construction and completion of a project, for a sum of RM67,994,500 under a construction contract dated 9 April 2015 ('the contract'). The project was known as 'Cadangan Membina dan Menyiapkan Satu (1) Blok Pangsapuri 24 Tingkat Rumah Pangsa Kos Sederhana (392) Unit di atas Tanah Tebusguna Kerajaan, Kampung Pisang Awak, Seksyen 4, Bandar Jelutong, Daerah Timur Laut, Pulau Pinang' ('the project').

I

[152] In carrying out the project, the appellant had engaged independent professional consultants, Perunding Kejuruteraan MSY and Perunding ZNA to provide a report in regards to cracked beams and a safety report. The consultants' fees incurred by the appellant were RM855,074.21 (inclusive of GST 6%). However, the respondent allegedly had failed, neglected, or refused to pay the said amount resulting the matter being brought to the adjudicator for adjudication under CIPAA.

[153] The payment claim dated 6 March 2019 was served on the respondent by the appellant under s 5 of the CIPAA for the sum of RM855,074.21, the amount claimed under the payment claim.

[154] In the payment claim, the appellant pleaded cll 28, 55 and 56 of the contract to establish its cause of action against the respondent. Paragraphs 32 and 33 of the payment claim states as follows:

> 32. The Amount Claim under this Payment Claim is due and payable to the Unpaid Party since 9 July 2017 read together with *clauses 55, 56, 28 of the P.W.D Contract* and pursuant to Section 36(3) and (4) of the CIPA Act 2012. In the absence of a contractual provision of time of payment, the amount claimed can be deemed due and payable within thirty [30] days from the date of submission of the Unpaid Party's revised Final Claim.
>
> 33. *TAKE NOTICE* that *you, being the Non-Paying Party are required to remit to the Unpaid Party the sum of RM855,074.21* being the amount claimed under this Payment Claim and *this Payment Claim is made pursuant to section 5 of CIPA Act 2012.* (Emphasis added.)

[155] The respondent in its payment response dated 22 March 2019, which was made under s 6 of the CIPAA and served on the appellant's solicitor, disputed the appellant's claim on the basis that the appellant's claim does not fall within the meaning of 'construction contract' under s 5(1) of the CIPAA. Further, it was contended that in the revised final draft claim, the professional fees and charges for Perunding Kejuruteraan MSY and Perunding ZNA had been deleted. This is stated at para 4 of the payment response as follows:

> 4. In reply to paragraph 15 of the Payment Claim, the non-paying party contends that there is a *latest Revised Final Draft Claim* issued by JUBM whereby the Professional Fees and Charges for the Perunding Kejuruteraan MSY and Perunding ZNA for *the sum of RM855,074.21 have totally been deleted.* (Emphasis added.)

[156] Further, in the adjudication claim served by the appellant on the respondent pursuant to s 9(1) of the CIPAA, the appellant again at para 63, relied on cll 28, 55 and 56 of the contract to support its claim for the professional consultants' fees.

[157] In the adjudication response served by the respondent on the appellant

under s 10(1) of the CIPAA, the respondent contended that the relevant clause in relation to the appellant's claim would be cl 36.5 of the contract which was not relied upon by the appellant.

[158] On 12 September 2019, pursuant to s 12(2) of the CIPAA, the adjudicator handed down the adjudicator decision which allowed the appellant's claim. The adjudicator found that the appellant has proved its case on the balance of probabilities and ordered the following:

(a) the respondent is to pay the appellant the outstanding amount of RM806,673.78 (excluding the GST) as sought in the payment claim within 14 days from the date of the adjudication decision in the manner of the banker's cheque;

(b) interest of 5%pa on the adjudication sum;

(c) the respondent is to pay the appellant the costs of the adjudication in the sum of RM11,070.88 within 14 days from the date of the adjudication decision in the manner of banker's cheque; and

(d) the respondent is to pay party-to-party costs in the sum of RM20,000 within 14 days from the date of the adjudication decision in the manner of the banker's cheque.

[159] In coming to the adjudication decision to allow the appellant's claim, the adjudicator relied on cl 36.6 of the contract rather than cll 28, 55, and 56 of the contract as submitted by the appellant in the payment claim and the adjudication claim. The adjudicator in his adjudication decision found that cl 36.6 is most applicable to the appellant's claim and not even cl 36.5 as submitted by the respondent.

[160] At the High Court, the application by the appellant to enforce the adjudication decision under s 28 of the CIPAA was allowed by the learned High Court judge who consequently dismissed the respondent's application to set aside the adjudication decision. In her decision, the learned High Court judge found that the adjudicator did not act beyond his jurisdiction and acted fairly and independently.

[161] However, on appeal to the Court of Appeal, the decision of the High Court was set aside on the ground that the adjudicator had acted in excess of his jurisdiction when deciding the adjudication on the clause of the contract that was not relied upon by the appellant in its payment claim and adjudication claim to support its cause of action. Further, the omission of the adjudicator to invite parties to submit on cl 36.6 of the contract relied upon by the adjudicator to support his decision is a denial of natural justice. The High

Court's decisions in dismissing the respondent's application to set aside the adjudication decision and in allowing the enforcement of the adjudication decision were set aside.

[162] Aggrieved with the Court of Appeal decisions, the appellant appealed against the decisions and is now before this court for determination.

THE APPEAL

[163] Counsel for the appellant submitted that strict rules of pleadings should not apply to CIPAA proceedings which are designed to be informal, speedy, and accessible to the layman for interim and temporary reliefs. The imposition of strict rules of pleadings is incorrect on, inter alia, the following grounds:

(a) s 8(3) of the CIPAA allows parties to be self-represented in CIPAA proceedings or be represented by laypersons such as architects or claim consultants or non-lawyers;

(b) s 13 of the CIPAA states that CIPAA proceedings is designed only as an interim forum;

(c) a payment claim is merely to be issued to kickstart the claim under the CIPAA regime, and not necessarily be a document to be referred to or before the adjudicator in determining the claim. What is eventually referred to in the substantive adjudication is merely the dispute arising from the payment claim and payment response as envisaged under s 7(1) of the CIPAA; and

(d) there is no requirement under s 9(1) for the claimant to raise in the adjudication claim specific references, submissions, and clauses applicable in the construction contract.

[164] Thus, question 1, it was submitted, ought to be answered in the negative.

[165] Next, counsel for the appellant submitted that there is no prohibition for an adjudicator from referring to a specific clause in the contract not stated in the payment claim and adjudication claim in allowing the claimant's claim. Therefore, the answer to question 2 should be in the negative.

[166] Further, it was contended by counsel for the appellant that the adjudicator's consideration of reliance on a specific clause not mentioned in the payment claim and the adjudication claim in allowing the claim without inviting parties to submit on the application of the said clause does not amount to a breach of natural justice or an act in excess of jurisdiction. Question 3 should also be answered in the negative.

[167] In the circumstances, it was submitted that both appellants' appeals should be allowed.

[168] In response, counsel for the respondent in essence, submitted that the adjudicator's jurisdiction is provided under s 27(1) of the CIPAA and limited to matters found in ss 5 and 6 of the same Act. In other words, the adjudicator's jurisdiction is to adjudicate matters in the payment claim and the payment response and any changes in this rule of engagement would need written consent between the parties as provided under s 27(2) of the CIPAA. In this case, cl 36.6 was never relied upon by the appellant in the payment claim which has been the basis for the adjudicator to allow the appellant's claim. As such, it was argued that the adjudicator had acted in excess of his jurisdiction.

[169] In addition, the respondent contended that the adjudicator's failure to invite parties to submit on the issue relating to cl 36.6 of the contract which was the basis of the adjudicator's decision, amounted to a breach of natural justice. This is also grounds to set aside the adjudication decision as provided under s 15(b) of the CIPAA.

THE DECISION OF THIS COURT

[170] In determining the present appeal before us, the main issue here is the jurisdiction of an adjudicator as provided under CIPAA. Statutory provisions under CIPAA have provided among others the jurisdiction of an adjudicator which is spelled out under s 27(1) as follows:

> 27 Jurisdiction of Adjudicator
>
> (1) Subject to subsection (2), *the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.*
>
> (2) The parties to adjudication *may* at any time by agreement in writing *extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.* (Emphasis added.)

[171] The wording of s 27 of the CIPAA is plain and unambiguous and as such, must be given its literal and ordinary meaning by the court. The intention of Parliament in its clear wording of the statute must be given its effect.

[172] This court in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; [1981] CLJ 39 explained this principle of law as follows:

> ... to paraphrase the words of Lord Diplock at p 541 in, *Duport Steels Ltd v Sirs*, *'the role of the judiciary is confined to ascertaining from the words that Parliament has*

approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral; ... (Emphasis added.)

(See also *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173; [2012] 4 CLJ 445 (FC); *Abdul Hakim bin Abdul Wahid v Mas Ermieyati bt Samsudin and another appeal* [2023] 4 MLJ 232; [2023] 6 CLJ 667 (FC).)

[173] The plain meaning of s 27(1) of the CIPAA is that the jurisdiction of an adjudicator is limited to matters referred to by parties to the adjudicator pursuant to ss 5 and 6 of the same Act. Section 5 relates to the payment claim whilst s 6 relates to the payment response. For ease of reference, ss 5 and 6 of CIPAA are reproduced below:

(a) s 5:

5 Payment Claim

(1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.

(2) The payment claim shall be in writing and shall include —

(a) The amount claimed and due date for payment of the amount claimed;

(b) *Details to identify the cause of action including the provision in the construction contract to which the payment relates;*

(c) Description of the work or services to which the payment relates; and

(d) A statement that it is made under this Act.

(b) s 6:

6 Payment Response

(1) A non-paying party who admits to the payment claim served on him *shall serve a payment response on the unpaid party together with the whole amount claimed or any amount as admitted by him.*

(2) A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, *shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute.*

(3) A payment response issued under subsection (1) or (2) shall be served on the unpaid party within ten working days of the receipt of the payment claim.

(4) A non-paying party who fails to respond to a payment claim in the

A manner provided under this section is deemed to have disputed the entire payment claim. (Emphasis added.)

[174] Section 5(b) requires the claimant to include in the payment claim the cause of action and the provision under the contract to which the payment relates. Thus, the claimant must identify the cause of action and the provision under the contract that supports the cause of action. If not, the phrase '... including the provision in the construction contract ...' under the said subsection will be meaningless or otiose. Certainly, the Parliament does not legislate in vain.

(See *Tony Pua Kiam Wee v Government of Malaysia and another appeal* [2019] 12 MLJ 1; [2020] 1 CLJ 337 (FC); *Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals* [2017] 2 MLJ 421; [2017] 9 CLJ 595 (FC).)

[175] If this court were to accede to the appellant's argument that it did not have to identify the provision in the contract that supports its cause of action, the question may then be asked: Does the law, procedural or substantive, allow the appellant to disregard sub-s 5(2)(b) which mandatorily ('shall') requires it to include in its payment claim the provision in the contract to which the payment relates? I do not think so. Effect must be given to the clear intention of Parliament.

[176] In any event, the cause of action in a contract must relate to a provision or provisions in the said contract to support the claim. The cause of action arises when there is a breach of a provision of the said contract or the payment becomes due under the provision of the contract. Therefore, the cause of action is subject to the agreed provisions in a contract. Thus, that is the rationale behind s 27(1) which requires the relevant provision in the contract.

[177] This court in *Nasri v Mesah* [1971] 1 MLJ 32 had explained succinctly the meaning of cause of action and cause of action in relation to a contract in the following words:

> A *'cause of action'* is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* [1888] 22 QBD 128, 131). In *Reeves v Butcher* [1891] 2 QB 590, 511 Lindley LJ said:
>
> > This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 509, 511 decided in 1843, that the *cause of action arises at the time when the debt could first have been recovered by action*. The right to bring an action may arise on various events, but it has always been held that the statute runs from the earliest time at which an action could be brought.

In Board of *Trade v Cayzer, Irvine & Co* [1927] AC 610, 617. Viscount Dunedin described 'cause of action' as that which makes action possible. Now, *what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from the breach (per Field J in Gibbs v Guild* [1881] 8 QBD 296, 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 57 IA 325). (Emphasis added.)

[178] Section 27(1) of the CIPAA expressly limits the jurisdiction of an adjudicator to adjudicate matters referred to the adjudicator to ss 5 and 6 of the same Act. This had also been acknowledged by this court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2017] 8 AMR 167 where Zulkefli PCA said this:

[54] The principle that jurisdiction is about subject-matter applies to every statute. Thus, the CIPAA applies only to 'construction contracts' as defined under the Act (see ss 2, 3, and 4), and that the 'payment dispute' must arise under a construction contract. *These are fundamental jurisdictional premises for the CIPAA to apply. Sections 5 and 6 of the CIPAA relate to this*. Section 5 of the CIPAA speaks of a 'payment pursuant to a construction contract'. By s 4 of the CIPAA, 'payment' is defined as 'payment for work done ... under the express terms of a construction contract'. The response under s 6 of the CIPAA has to be in relation to the 'payment' claim under ss 4 and 5 of the CIPAA as to whether it is admitted or disputed.

[55] By s 27(1) of the CIPAA*, the arbitrator's jurisdiction 'is limited to the matter referred to adjudication' pursuant to ss 5 and 6 of the CIPAA.* It refers to the 'identification of the cause of action' in relation to the construction contract as required under s 5(2)(b) of the CIPAA. In turn, the payment response under s 6 of the CIPAA is defined and limited by the claim under s 5 of the CIPAA.

[56] *In short, s 27(1) of the CIPAA refers to the subject matter of the claim under s 5 of the CIPAA, which is the 'cause of action' ide ntifie d by the claimant by reference to the applicable clause of the construction contract.* Thus, if the payment claim relates to progress claim No 28 (as in the present case) the jurisdiction of the adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to progress claim No 28.

[57] *It can thus be said that the appellant's case regarding the jurisdiction referred to in s 27(1) of the CIPAA, is the subject matter of the claim and the cause of action as that identified under the relevant provision of the construction contract.* By s 27(2) of the CIPAA, the parties may by consent extend the jurisdiction of the adjudicator to cover other matters. A typical example will be that of other progress claims falling due before the adjudication commences. Section 27(1) of the CIPAA has nothing to do with the grounds of the claim or the reasons for opposing the claim. (Emphasis added.)

[179] In the *View Esteem* case, as alluded to above, emphasis was made by this

court on the need to identify the applicable clause of the construction contract which relates to the cause of action.

[180] The issue of the adjudicator's jurisdiction was also aptly observed by the learned High Court judge (as she then was) in *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd* [2015] MLJU 1125; [2015] 1 LNS 1236 as follows:

> [27] *Subsection 27(1) restricts the jurisdiction of the adjudicator to the matters found in ss 5 and 6. In short, the adjudicator takes jurisdiction from the payment claim and the payment response*; not from the adjudication claim, adjudication response, or even the adjudication reply. This is materially significant and important as this brings to bear the whole scheme of CIPAA 2012; that the adjudication proceedings is to deal with or resolve a payment dispute. That dispute is then referred to adjudication with the payment claim and payment response reduced into the formal forms as set out in ss 7 to 10. Because the parties are already in dispute mode and are aware of or familiar with their varying positions, the payment dispute is focused and intense. *The adjudicator's sole task is to resolve that dispute for the reasons already made known between the parties; and nothing else. Any change to those rules of engagement requires a written consent between the parties and that is clear from subsection 27(2).* Were it otherwise, there would be no fair play and ultimately, no confidence in the mechanism that has been so elaborately set up by Parliament. It makes no difference if there is no payment response; as the lack of a payment response simply means that the claimant who bears the burden of proving its claim anyway, has just got to get on with proving its claim. (Emphasis added.)

[181] At the risk of repetition, it is settled law that the adjudicator's jurisdiction is limited to matters referred to the adjudicator pursuant to ss 5 and 6 of the CIPAA. An adjudication beyond the matters referred to needs written consent from the parties as required under sub-s 27(2) of the same Act.

[182] Having considered the law, I now revert to the present case. As alluded to earlier, the appellant in its payment claim, at paras 32 and 33 claims the unpaid sum of RM855,074.21 based on cll 28, 55 and 56 of the contract. For ease of reference and understanding, it is pertinent to reproduce the said clauses which are as follows:

(a) cl 28 — PAYMENT TO CONTRACTOR AND INTERIM CERTIFICATES:

> 28.1 — When the contractor has executed work including delivery to or adjacent to the works of any unfixed materials or goods intended for incorporation into the works in accordance with the terms of this contract and their total value of work thereof has reached the sum referred to in Appendix, the SO shall at that time make the first valuation of the same.
>
> 28.2 — Thereafter, once (or more often at the discretion of the SO) during the course of each succeeding month the SO shall make a valuation of the

works properly executed and of unfixed materials and goods delivered to or adjacent to the site, provided that the total value of work properly executed and the value of unfixed materials and goods as specified in clause 28.4 hereof, delivered to the site intended for incorporation into the works in each subsequent valuation shall not be less than the sum referred in the Appendix.

28.3 — Within fourteen (14) days from the date of any such valuation being made and subject to the provision mentioned in clause 28.1, the SO shall issue an Interim Certificate stating the amount due to the contractor. PROVIDED THAT the signing of this contract shall not be a condition precedent for the issue of the first Interim Certificate (and no other) so long as the Contractor has returned the Letter of Acceptance of tender duly signed and has deposited with the SO or the relevant insurance policies under clauses 15 and 18 hereof.

28.4 — The amount stated as due in an Interim Certificate shall, subject to any agreement between the parties as to payment by stages, be the estimated total value of the work properly executed and up to ninety percent (90%) of the value of the unfixed materials and goods delivered to or date the valuation was made, less any payment (including advance payment) previously made paid under this Contract. PROVIDED THAT such certificate shall only include the value of the said unfixed materials and goods as and from such time as they are reasonably and properly and not prematurely delivered to or adjacent to the site and adequately protected against weather, damage, and deterioration.

28.5 — This clause shall not apply to any unfixed materials and goods which are supplied and delivered by the Nominated Suppliers for which payment shall be made for the full value of the unfixed materials and goods.

28.6 — Within a number of days as stated in Appendix (or if none stated then within thirty (30) days of the issue of any such Interim Certificate), the Government shall make a payment to the Contractor as follows:

(a) where the Performance Bond is in the form of a Banker's, Insurance, or Finance Company Guarantee, payment shall be made on the amount certified as due to the contractor in the said Interim Certificate; or

(b) where the Performance Bond is in the form of a Performance Guarantee Sum; payment of the ninety percent (90%) on the amount certified as due to the contractor shall be made with the remaining ten percent (10%) being retained by the Government as a Performance Guarantee Sum. PROVIDED THAT when the sum retained is equivalent to five percent (5%) of the contract sum then in any subsequent Certificate, payment shall be made on the full amount certified as due to the Contractor.

(b) cl 55 — EVENT AND CONSEQUENCES OF DEFAULT BY GOVERNMENT:

Default of Obligations

(a) Events of Default

If the Government without any reasonable cause fails to perform or fulfil any of its obligations which adversely affects the Works;

then the Contractor may issue a notice specifying the default of the Government and requiring the Government to remedy the same within the period specified therein taking into account the nature of the remedy to be carried out by JKP Sdn Bhd or such other period as may be agreed by both Parties from the date of receipt of such notice.

(b) Termination

If JKP Sdn Bhd fails to remedy the default period specified in such notice issued under clause 55 (a) within the stipulated time therein, the Contractor shall have the right to forthwith terminate this Contract by giving written notice to the effect.

(c) Consequences of Termination

If this Contract is terminated under clause 55(b)

(i) JKP Sdn Bhd shall pay to the Contractor —

(a)the value of the Works carried out up to the date of termination;

(b) the amounts payable in respect of any preliminary items so far as the work or service comprised therein has been carried out or performed and a proper proportion of any such items which have been partially carried out or performed;

(c) the cost of materials or goods reasonably ordered for the Works which have been delivered to the contractor or of which the Contractor is legally liable to accept delivery (such materials or goods becoming the property of the Government upon such payment being made to the Contractor); and

(d) a sum being the amount of any expenditure reasonably incurred by the Contractor in so far as such expenditure has not been recovered by any other payments referred to in this sub-clause.

(ii) For the avoidance of doubt, the Parties hereby agree that the Contractor shall not be entitled to any other form of losses including loss of profit, damages, claims, or whatsoever upon termination of this contract.

(c) cl 56 — CERTIFICATE OF TERMINATION COSTS

56.1 — As soon as the arrangements for the completion of the Works made by the JKP Sdn Bhd enable the SO to make a reasonable accurate assessment of the ultimate cost of completing the Works following the termination of the Contractor's employment and the engagement of other contractors or persons, and the amount of direct loss and/or damage caused to the Government due to the termination has been ascertained by the SO, then the SO may issue a certificate (hereinafter referred to as the 'certificate of Termination Costs') stating the completion Cost (herein defined) and the Final Contract Sum (hereinafter defined).

56.2 — The Completion Cost comprises the following sums, cost or expenditure:

(a) the sums previously paid to the Contractor by JKP Sdn Bhd;

(b) the sums paid or payable to other contractors or persons engaged to complete the Works;

(c) any sums paid to sub-contractors or suppliers under clause 61;

(d) any costs or expenditures incurred or to be incurred including On-Cost Charges incurred by JKP Sdn Bhd in completing the Works; and

(e) the amount of direct loss and/or damage caused to JKP Sdn Bhd due to the termination.

56.3 — The Final Contract Sum comprises of the following amounts or sums:

(a) the amount which would have been payable under the Contract on the completion in accordance with the Contract, allowing any variations or other matters which would have resulted in an adjustment of the original Contract Sum; and

(b) any other sums which JKP Sdn Bhd might be entitled under the terms of the Contract to deduct from the original Contract Sums,

(c) had the Contractor's employment not been terminated.

56.4 — The certification of Termination Costs shall state the difference between the Final Contract Sum and the Completion Cost. If the Final Contract Sum is less than the Completion Cost, the difference shall be the debt payable by the Contractor to the Government to the Contractor.

56.5 — The Certificate of Termination Costs shall be binding and conclusive on the Contractor as to the amount of such loss or damage specified therein.

56.6 — In the event the completion of the Works being undertaken departmentally, allowance shall be made, when ascertaining the amount to be certified as costs and expense incurred by the Government, for cost of supervision, interest, and depreciation on plant and all other usual overhead charges and profit as would be incurred if the works were completed by other contractors or persons.

[183] However, the adjudicator in this case, in his adjudication decision held that the most applicable clause for the appellant's claim against the respondent is cl 36.6 of the contract and allowed the claim based on the said clause. In the adjudication decisions at paras 100, and 101 this was said:

100. The respondent argued that the correct and crucial provision of the Contract is Clause 36.5 of the COC and that the Claimant has not invoking (sic) this provision in support of its claim. However, in my considered opinion, *Clause 36.6 of COC are the one most applicable to the Claimant's claim.* Clause 36.6 of COC which provides as below:

> 36.6 Notwithstanding anything in clause 36.5, *if the Contractor carries out any further test as required by the SO* pursuant to clause 36.2 and the result of such test shows the workmanship or materials is not in accordance with the provisions of the Contract, then the cost of such test shall be borne by the Contractor. *But if the result of such test shows the workmanship or materials comply with the provisions of the Contract, then the cost of such test shall be borne by JKP Sdn Bhd.* (Emphasis added.)
>
> 101. *Clearly and certainly, in order to succeed the claim pursuant on the above clause, the burden is on the Claimant* to show a cogent proof of whether the Claimant has received any instruction or direction by the Respondent or Respondent's consultants under the Contract at the material time.

[184] Further, at paras 104 and 105 of the adjudication decision, the adjudicator states this:

> 104. As the Independent Consultants ie the Professional Engineer has certified and endorsed the building is safe and this would have meant that the Claimant has carried out the construction work are in accordance with the Contract. This is opposing to what allegation put forth by the Respondent that the construction works carried out by the Claimant are not in accordance with the Contract and that had compromised the safety of the building. *Therefore, pursuant to Clause 36.6 of the COC* which further provides as below:
>
> > But if the result of such test shows the workmanship or materials comply with the provisions of the Contract, then the cost of such test shall be borne by the JKP Sdn Bhd.
> >
> > ...
>
> 105. *By foregoing reason and considering all the facts and circumstances available to me, I am hold (sic) to determine that the Claimant has proved, on the balance of probabilities, and that the Respondent shall pay the cost of the Independent Consultants* which engaged by the Claimant in produce the relevant report as instructed by the respondent's consultants. (Emphasis added.)

[185] Reading the paragraphs of the adjudication decision alluded to above, it is undoubtedly that the adjudicator had relied on cl 36.6 of the contract in allowing the appellant's claim. This clause was not relied upon by the appellant in the payment claim filed under s 5 to establish its claim, nor mentioned by the respondent in the payment response filed under s 6 of the CIPAA. In addition, having perused the adjudication decision, there is nowhere to show that the adjudicator relied on cll 28, 55, or 56 of the contract which were the provisions relied upon by the appellant in its payment claim to establish its cause of action.

[186] As the adjudicator's jurisdiction is limited to matters referred to the adjudicator under ss 5 and 6, and the cause of action based on cl 36.6 was not relied upon in the payment claim, the adjudicator had exceeded his jurisdiction in deciding the dispute based on cl 36.6 of the contract. The cause of action

under cl 36.6 was not the appellant's case in the payment claim or the respondent rebuttal in the payment response.

[187] In our neighbouring country, Singapore, the adjudicator is also clothed with the same limited jurisdiction as provided under s 17(3) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). In explaining the application of the said provision, Sundaresh Menon CJ in *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2013] SGCA 32 said this:

> 46. This subsection sets out what an adjudicator is permitted to consider and expressly provides that he 'shall only have regard to [those] matters'

[188] Likewise in the present case, s 27(1) has expressly limited the adjudicator to adjudicate only matters pursuant to ss 5 and 6, not any other matters which have been discussed earlier.

[189] Moreover, both parties have not given written consent to extend the adjudicator's jurisdiction to adjudicate the matters relying on the cause of action established in cl 36.6 of the contract as required under s 27(2) of the CIPAA. In my view, if the adjudicator finds that the cause of action was established under a different clause of the contract, as in the present case, the matter should be brought to the attention of the parties and if agrees, written consent be issued under s 27(2) to clothe the adjudicator with the jurisdiction to adjudicate the matters based on the cause of action under cl 36.6.

[190] On this ground of want of jurisdiction alone, the adjudication decision cannot stand. The adjudicator had acted in excess of his jurisdiction and ground to set aside the adjudication decision under s 15(d) of the CIPAA which states:

> 15 Improperly Procured Adjudication Decision
>
> An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) The adjudication decision was improperly procured through fraud or bribery;
>
> (b) *There has been a denial of natural justice*;
>
> (c) The adjudicator has not acted independently or impartially; or
>
> (d) *The adjudicator has acted in excess of his jurisdiction.* (Emphasis added.)

[191] The next issue before this court is whether there was a denial of natural justice when parties in the present case were not given the right to be heard on the application of cl 36.6 which was the adjudicator's basis for allowing the appellant's claim. The denial of natural justice is also a ground to challenge the

adjudication decision provided under s 15(b) of the CIPAA.

[192] The concept of natural justice is well settled that parties must be given the right to be heard before a decision is made. A judge should not decide on an issue which was not pleaded and it is not the duty of the court to create a cause of action under the guise of doing justice. This court in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293; [2009] 6 CLJ 430 reiterated this principle as follows:

> [16] The court also decides a case after considering the evidence adduced by each party and documents produced by them. Neither party should be taken by surprise. Even in respect of law, whether it is the court at first instance or the appellate court, judges rely heavily on the submissions put forward by the respective counsel. A good counsel is one who produces authorities to support the statement of law he is relying upon. The authorities can be in the form of reported judgments, text books, or even published law articles. In fact, according to etiquette, he is supposed to even bring to the attention of the court authorities which favour his opponent's case. Of course, in such an instance, he would then distinguish the facts of the case before the court to the case in the authority. *It is therefore dangerous and totally unadvisable, for the court, on its own accord, to consider any point without reliance on any pleadings or submission by counsel appearing before them. If the learned judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight that to the parties before him. He must then give an opportunity for both parties to further submit on that particular point. There have been instances where a judge may already form some opinion on certain issues, legal or otherwise, but after hearing submissions and views expressed by a party, he may conclude differently.*
>
> [17] *The effect of a judge making a decision on an issue not based on the pleadings and without hearing the parties on that particular issue would be in breach of the latin maxim audi alteram partem, which literally means, to hear the other side, a basic principle of natural justice.* (Emphasis added.)

[193] The same principle was acknowledged by this court in *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590; [2016] 8 CLJ 293 and further said this:

> [21] *It is thus clear that whenever the court proposes to consider a fresh issue which the court considers pertinent to the case before it, it should give the parties the right to make submissions on the proposed issue before arriving at its finding.* This is fundamental in the adversarial system that we practice in this country. (Emphasis added.)

[194] Further, on the concept of natural justice, Tengku Maimun CJ in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 at p 825 said this:

> [188] In simpler terms, natural justice which encapsulates the twin concepts of *nemo judex in causa sua* (the rule against bias) and *audi alteram partem (the right to be heard)*, are integral features of a written constitution which protects fundamental liberties. *Both rights are equally important but for the purpose of this judgment,*

particular emphasis is given to the right to be heard. On that right, Bhagwati J observed in Maneka Gandhi that 'the soul of natural justice is fair-play in action and that is why it has received the widest recognition throughout the democratic world'. (Emphasis added.)

[195] Reverting to the present case, it is undisputed that parties were not given the opportunity to submit the cause of action under cl 36.6 of the contract before the adjudication decision was handed down. Besides the principle of the right to be heard, the submission by parties as highlighted in the *Pacific Forest case*, may persuade the judge or in the present case, the adjudicator, to decide differently. The principle of natural justice includes allowing parties to present their case effectively.

[196] In an old case, *Semtex Ltd v Gladstone* [1954] 2 All ER 206 at p 212, Finnemore J said this:

> Natural justice requires that the appellant *be given a full and adequate hearing*, and opportunity to give evidence on behalf of himself if he so desires and to call such witnesses as he considers necessary for his case ... Natural justice is not something which any one of us can define in our own terms. It is basic. (Emphasis added.)

[197] In the circumstances, I find, the non-giving of the opportunity by the adjudicator for the parties to submit or canvass the issue of cause of action under cl 36.6 before making the decision, is a denial of natural justice.

[198] In the present case, the main question is whether the applicant's cause of action established under any of the clauses in the contract and pleaded in the payment claim are matters adjudicated by the adjudicator as mandated under s 27(1) of the CIPAA. The issue of strict rules of pleading in civil claims to be complied with does not arise and is misplaced as s 27(1) has underlined the limited jurisdiction of the adjudicator to adjudicate matters referred to the adjudicator under s 5, that is the payment claim and s 6, which is the payment response. The answer to this main question is in the negative.

[199] Based on the analysis and views mentioned above, I find it unnecessary to answer the questions posed by the appellant for me to decide on this appeal.

CONCLUSION

[200] In the circumstances, both the appellant's appeals are dismissed and the decisions of the Court of Appeal are affirmed. The appellant is to pay costs to the respondent in the sum of RM60,000 subject to payment of the allocator. The Chief Judge of Sabah and Sarawak (CJSS) has read this judgment in the draft and has agreed to it. My learned sister Justice Mary Lim Thiam Suan is dissenting.

Appeals dismissed.

Reported by Ahmad Ismail